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ABSTRACT

Fifteen newspaper articles about crime and justice in America are contained in this document. As the basis for a 15-week course by newspaper during the fall of 1977, the articles served as the course "lectures." The articles were written by professors of law, psychology, sociology, philosophy, and criminology; attorneys and judges; and researchers. They explore crime in America and consider its causes, theories of prevention, and the institutional means employed to combat it, including police, courts, and corrections. The relationship between sex, race, and crime is examined, as well as historical and future perspectives on criminal punishment. White-collar crime, organized crime, and urban crime are defined. Each article is preceded by a biographical statement about the author. (Author/AV)

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crime and justice in america

Newspaper Articles for the Seventh Course by Newspaper

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PREFACE

The fifteen articles in this booklet explore the phenomenon of crime in America and consider its causes, theories of prevention, and the institutional means employed to combat it, including police, courts, and corrections. Crime is interpreted as an American paradox: It is feared and deplored, yet persists and grows. These articles examine the paradox by focusing on cultural contradictions in American society regarding crime, justice, and punishment.

These articles were originally written for the seventh Course by Newspaper, CRIME AND JUSTICE IN AMERICA, offered for the first time in the fall of 1977. Jerome H. Skolnick, director of the Center for the Study of Law and Society and professor of law at the University of California, Berkeley, coordinated this course.

Courses by Newspaper, a national program originated and administered by University Extension, University of California, San Diego, develops college-level courses that are offered to the public by hundreds of cooperating newspapers and colleges and universities throughout the country.

A series of weekly newspaper articles, written by a prominent "faculty," comprises the "lectures" for each course. A supplementary book of readings, a study guide, and audio-cassettes are also available to interested readers, with a source book available to community discussion leaders and instructors. Colleges within the circulation area of participating papers offer the opportunity to meet with local professors and to earn college credit.

In those areas where a newspaper is interested in running the series and no local academic institution wishes to participate, credit arrangements can be made with the Division of Independent Study, University of California, Berkeley.

The first Course by Newspaper, AMERICA AND THE FUTURE OF MAN, was offered in the fall of 1973, with funding from the National Endowment for the Humanities and a supplementary grant from the Exxon Education Foundation. Subsequent courses have included IN SEARCH OF THE AMERICAN DREAM, two segments of THE AMERICAN ISSUES FORUM, OCEANS: OUR CONTINUING FRONTIER, and MORAL CHOICES IN CONTEMPORARY SOCIETY. To date, about 600 newspapers and more than 300 colleges have presented the courses. Approximately 15 million people read the articles for each course, and almost 25,000 persons have earned credit through Courses by Newspaper.

Courses by Newspaper has been funded since its inception by the National Endowment for the Humanities, a federal agency created in 1965 to support education, research, and public activity in the humanities. Supplemental funding for this course has been contributed by the Center for Studies of Crime and Delinquency, National Institute of Mental Health. We gratefully acknowledge their support.

We also wish to thank United Press International, which cooperated in distributing the articles to participating newspapers across the country.

The views presented in these articles, however, are those of the authors only and do not necessarily reflect the views of the University of California or the funding and distributing agencies.

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Crime: No Simple Solutions

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Perry Kretz© Stern/Black Star

SAN QUENTIN PRISON, CALIFORNIA. Some observers have proposed to solve the crime problem in the United States by locking up more criminals for longer periods of time, but prisons such as this one at San Quentin have high economic and social costs.

I: CRIME: NO SIMPLE SOLUTIONS

JEROME H. SKOLNICK

Americans are upset about crime.

We are understandably angry and frustrated when we cannot safely walk down city streets, or take the kids on a camping trip for fear the house will be robbed in our absence.

We are morally outraged when we discover that businessmen and government officials have been conspiring to use public funds for private gain.

Sometimes, frustration virtually tempts us to demand the ridiculous—to insist that there be a law against crime. In fact, of course, many laws already prohibit and threaten severe punishment for all sorts of conduct, including armed robbery, obstruction of justice, failure to report income, and the use of various drugs.

Yet, for many reasons, we cannot count on the criminal law alone to work perfectly, to prevent crime entirely.

First, not everyone reveres criminal law, or not in the same way. By passing a law we may even make the prohibited conduct more popular. President Hoover's Wickersham Commission, which studied the effects of Prohibition on the nation during the 1920s, concluded that a new institution—the speakeasy—made drinking fashionable for wide segments of the professional and middle classes who had previously not experienced the sinful delight of recreational boozing.

It is evident that the passage of law, especially criminal law, does not always work out the way those who advocated passage foresaw.

LEGISLATIVE POLITICS

Second, criminal law reflects through political advocacy different and conflicting views—and so it changes. Teetotalers scrupulously obeyed the prohibition laws; drinkers did not. Drinkers changed the law.

During the 1960s, laws prohibiting marijuana use amounted to a new prohibition. People over forty—who drank whiskey—complied with the law and

were offended by younger people who smoked marijuana. As younger people are becoming successful politicians, penalties for smoking marijuana continue to diminish and may eventually disappear.

We could introduce criminal penalties for manufacturing defective automobile brakes, which kill and maim thousands. But we don't because in recent years the automobile manufacturers' lobby has had more clout than Ralph Nader, who proposed such laws in the Congress. Maybe that, too, will change.

Other crimes—serious street crimes such as murder, rape, assault, and robbery—are almost universally condemned. It is these crimes that are the focus of proposals to "solve" the crime problem by increasing the severity and certainty of punishment.

Why, then, not simply enforce these laws more rigorously and punish swiftly and surely those found guilty of violating them? Many people—including some prominent criminologists—have advocated this seemingly simple and therefore attractive solution to the problem of American crime. But such a solution is not so simple. A criminal justice system can increase risk for a criminal—but not by much, and at higher cost than many people believe.

HIGH COST OF PUNISHMENT

The social and economic costs of punishment are often underestimated. It is easy to call for a major expansion of law enforcement resources; it is less easy to pay for it.

Policemen, courts, and prisons are expensive. It is cheaper to send a youngster to Harvard than a robber to San Quentin. And the average San Francisco policeman now draws—with pension—more than $25,000 per year, to say nothing of his police car, support equipment, and facilities.

The recent experience of a "law and order" administration that poured billions of dollars through the Law Enforcement Assistance Administration into the war on crime is exemplary and sobering. While violent crime rose 174 percent from 1963 to 1973, local spending for law enforcement multiplied more than seven times—and L.E.A.A. poured in $3.5 billion between 1969 and 1974.

MOTIVES OF CRIMINALS

The war on crime looks more and more like the war in Vietnam. Those who pursue it are largely ignorant of what motivates the enemy.

Of course the threat of punishment deters. But nobody is clear about how much threat deters whom with what effect. For example, millions of presumably rational human beings are not deterred from smoking cigarettes even though the probabilities of punishment through cancer, emphysema, and heart disease are clear and painful. People often believe that present benefits or pleasure outweigh future costs or threats of pain.

Heavy punishment programs can also incur unexpected social costs. Several years ago Nelson B. Rockefeller, then governor of New York, proposed as an answer to street crime that harsh sentences, up to life imprisonment, be imposed for drug trafficking, and that sterner enforcement and heavier punishment be imposed against drug users, many of whom are engaged in street crime. The "lock-'em-up" approach seemed sensible and hardheaded to many New Yorkers fearful of walking the city streets and to numerous law enforcement officials.

Yet a recently conducted *New York Times* survey of 100 New York City judges, reported on January 2, 1977, found that the new, very tough narcotics law failed to deter illegal drug use in the city. Furthermore, over half the judges believed the laws had worsened the situation because youngsters—immune from the harsher provisions—had been recruited into the drug traffic. This is an unexpected social cost of punishment. There are many others.

Particularly for young people, being a criminal may even have advantages over working in a boring and unrewarding job. One can earn far more stealing cars than washing them. Even the risk may prove advantageous. In some circles, a "jolt" in prison offers an affirmation of manhood—as well as advanced training in criminal skills and identity. Thus, the administration of justice can generate criminality as well as deter it.

Actually, the most promising targets of deterrence are white-collar criminals—business executives and professionals—who have the most to lose by conviction for a crime and are more likely to weigh the potential costs of committing crime against its benefits.

FUNDAMENTAL CONTRADICTIONS

There are no easy prescriptions for crime in America. It has become an intrinsic part of life in this country as a result of fundamental contradictions of American society. We maintain an egalitarian ideology amidst a history of slavery and contemporary unemployment. We say we are against organized crime, but millions of us enjoy and consume its goods and services—drugs, gambling, prostitution, pornography.

We demand heavier punishment—longer prison terms—yet fail to appreciate the social and economic costs of prisons. We support the Constitution and its protection of individual liberties—yet criticize judges who insist that police conduct themselves in accord with constitutional protection.

Our legacy of slavery, immigration, and culture conflict, combined with the ideologies of free enterprise and constitutional democracy, is unique in the world. As David Bayley's recent work comparing high American with low Japanese crime rates shows, we are not strictly comparable to Japan or, for that matter, to any place else.

Although politicians—as well as some scholars and police spokesmen—will try to sell us on apparently simple solutions to the American crime problem, we should remain skeptical. In the past simple solutions have not worked.

Unless we understand why, the future will prove comparably unsuccessful. We have to know what doesn't work to find out what might. The reasons for past failure and possible remedies will be further explored in later articles in this fifteen-part series on institutional crime, street crime, the limits of the criminal law, the administration of criminal justice, and the organization of punishment.

White-Collar Crime

ABOUT THE AUTHOR

Gilbert Geis

GILBERT GEIS is professor of social ecology at the University of California, Irvine, having previously taught for many years in the sociology department at California State University, Los Angeles. The recipient of many grants to study compensation for victims of crime and rehabilitation of narcotics addicts, he has written extensively about these subjects as well as juvenile delinquency, violence, and white-collar crime. His books include *Man, Crime, and Society* (co-authored with Herbert A. Bloch), *Public Compensation to Victims of Crime*, and *White Collar Crime*, which he edited with Robert Meier.

Wide World Photo

Wide World Photo

THE TREATMENT OF "UPPERWORLD" CRIMINALS. (Left) Dr. Armand Hammer, multimillionaire chairman of Occidental Petroleum Corp., on his way to court in Los Angeles to plead guilty from a wheelchair to charges of illegal campaign contributions, March 4, 1976. He was fined $3,000 and placed on a year's probation. (Right) Hammer arrives at Blair House for a meeting with President-elect Jimmy Carter to discuss the economy, December 9, 1976.

II: WHITE-COLLAR CRIME

GILBERT GEIS

Why do persons who have wealth and power take and offer bribes, cheat on their income taxes, violate antitrust laws, and knowingly market defective automobiles and airplanes?

The answers are as different as the crimes themselves. Some persons commit such offenses because they want more money or more power or a corporate promotion. Others do such things because they think that's the way business has always been conducted. And still others do it because they are lazy, or don't really see anything wrong with cheating, bribing and deception.

One thing is certain: the standard explanations for juvenile delinquency and criminal behavior cannot account for "white-collar crime"—the name by which such upperworld law-breaking is known. Poverty, broken homes, reading disabilities, psychiatric disorders, and similar disadvantages do not explain the behavior of wealthy and entrenched white-collar criminals.

Such criminals can be well-educated, happily married, devout in their church attendance, and marvelously successful in their jobs. But these conditions do not make or keep them honest.

White-collar crime is commonplace in the United States—just how common is not known because good statistics are lacking. The late Senator Philip Hart once estimated that the nation lost $200 billion annually from white-collar crime, while the U.S. Chamber of Commerce gave a much lower but still startling figure—$40 billion per year.

PUBLIC CYNICISM

Most citizens take such extensive white-collar crime for granted. Indeed, public cynicism may be its most corrosive characteristic. For example, we seem to expect politicians to be subject to influence, if only by the subtle insinuations of campaign contributions.

Court-ordered sanctions against corporations and cease and desist orders from administrative agencies are regarded as part of the normal price of doing business, in the same manner that prostitutes consider fines and arrests to be occupational hazards.

Professional persons, supposedly trained to altruism and ethics, engage in white-collar crime. Income tax authorities believe that doctors and lawyers, as self-employed persons, do much more cheating on their taxes than most of us. Recent Senate investigations have revealed widespread evidence of fraud by doctors submitting claims under Medicaid. Many lawyers do not necessarily obey the law, as indicated by the extraordinarily large roster of attorneys involved in the Watergate crimes.

Hypocrisy is a hallmark of white-collar crime. For example, during testimony before the Senate Banking Committee's hearing on government loans to Lockheed, the company's chairman, Daniel J. Houghton, reportedly objected to the use of the word "bribes" in connection with the $22 million payments to foreign officials and politicians. He preferred, his lawyer said, the word "kickback."

Former President Nixon and his Attorney General called for harsh punishments for street criminals at a time when they themselves were enmeshed in extensive criminal activity. Such statements characterize the double standard for underworld and upperworld crime.

COSTS OF WHITE-COLLAR CRIME

White-collar criminals steal more money than traditional criminals. Thus, bank embezzlers steal much more from banks than robbers; a million dollar robbery would be a sensational news event, while a million dollar embezzlement is run-of-the-mill.

The heavy electrical equipment conspiracy in 1961, one of the first major corporate criminal cases, involved millions of dollars of overcharges to public utilities and government. Nevertheless, it was reported under "Business" news in one of the country's leading weekly magazines, with the "Crime" section reserved for "real" crime.

Yet white-collar crime can produce more social damage than so-called "real crime." Muggings, burglaries and robberies can unite people in moral condemnation of the behavior. As the French sociologist Emile Durkheim noted, such crimes can make people behave better by emphasizing what we abhor and showing what happens to people who behave in an unacceptable manner.

White-collar crimes, on the contrary, breed social malaise. They create distrust, cynicism, and greed—if others are doing it, I'll get my share too. Tax authorities, for example, believe cheating increased sharply after revelation of Mr. Nixon's tax deceits.

What can be done about white-collar crime?

AROUSING THE PUBLIC

It is essential, first, to recognize its existence and its importance. Street crimes and traditional offenses are routinely tabulated by government agencies. Every three months the media herald their publication, noting either that the number of offenses are higher (usually they are), or are showing an encouraging, although slight decline. These reports strongly influence public attitudes and public policy.

No government agency regularly proclaims how much antitrust activity is going on, whether doctors are involved in less Medicaid fraud or more, or whether bribery is on the increase. Large federal grants, particularly from the Law Enforcement Assistance Administration in the Department of Justice, have gone to investigate street crime and strengthen police forces to deal with such crime. The rare LEAA activities on white-collar crime have focused almost exclusively on fly-by-night consumer frauds. Crimes by the entrenched and powerful remain unexamined.

Part of the problem of arousing public and official concern lies in the diffuse character of injury from white-collar crime. Street crimes of violence produce immediate injury; illegal air pollution kills more slowly. Steal someone's wallet and the scream of anguish is immediate. But over-charge them a few pennies on a purchase and the outrage disappears.

PRISONS VS. CRIME

Difficult issues arise, too, in regard to the most effective manner of dealing with captured white-collar criminals. It is unlikely that they will ever again do what they were caught at (but then, the same is true for murderers).

Some would argue that white-collar criminals should not be imprisoned, and that the shame they reap seems punishment enough. Furthermore, if they are professional persons, they may be barred from practicing their vocation, although professional groups often seem more concerned with protecting perogatives than with prosecuting miscreants.

Others differ, saying that we need to make an example of white-collar criminals to deter others. They argue too that justice and fairness insist that "crimes in the streets" and "crimes in the suites" be treated similarly.

One recent head of the Justice Department's Criminal Division, Richard Thornburgh, argued that "imposition of prison terms, joined with appropriately high fines, should be the rule in white-collar cases . . . . At present, sad to say, the benefits which an offender can anticipate from many white-collar crimes may be measured in millions of dollars."

Some say that the white-collar criminal is more culpable: having more advantages than others, he bears more responsibility to obey the law. Thornburgh observed, "It is hard to justify incarcerating the ghetto youth for the theft of a car while at the same time putting on probation the corrupt government official or crooked attorney who has abused his position and milked the public for larger sums of money."

White-collar criminals, like most criminals, lack sympathy for their victims. They don't understand—or care—that they are hurting others who have a right to fair dealing. Ralph Nader has suggested that a coal mine executive who runs an unsafe pit, for instance, should be sentenced to work in the mines, where he would acquire a feeling of empathy for those he was exposing to danger.

Whatever the remedy for white-collar crime, nobody looking at the facts can fail to be convinced that the phenomenon requires more attention than it currently receives from the public, criminologists, and government authorities. White-collar crime is real criminality, and it deserves our full concern if not our indignation. It has been covered up for too long.

Organized Crime

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ROGUES' GALLERY. (Left to Right) Louis "Lepke" Buchalter, head of Murder, Inc. and the rackets in New York in the 1930s; Frank Costello, New York boss and alleged gambling czar in the late 1940s and early 1950s; and Sam Giancana, Chicago boss from the mid-1950s to mid-1960s.

III: ORGANIZED CRIME

FRANCIS A. J. IANNI

Fear of having one's home burglarized or of being mugged or held at gun point for one's wallet has left few persons indifferent to the "crime problem" in America.

But how many of us who waited in line to see *Godfather Part II* lost any sleep that night worrying about organized criminal activity in American cities?

Organized crime has become such an integral part of the politics and economics of urban life that most Americans do not consider it a personal problem.

Although a number of illegal activities are defined by law enforcement officials as products of organized crime—drug peddling, gambling, prostitution, extortion, and loan-sharking—large segments of the public regard some of these crimes as minor "vices" that hurt no one except, perhaps, the tax collector. Over the years, organized crime—viewed by many as the special domain of Italian immigrants—has thrived on public demands for its services and on widespread corruption. It has virtually become an "American way of life."

AN ITALIAN CONSPIRACY?

As early as the last decade of the nineteenth century, when eleven reputed *Mafiosi* accused of assassinating the city's police chief were lynched by a New Orleans mob, it was alleged that Italians brought organized crime with them to America. Eighty years after the New Orleans lynchings, a Harris Poll indicated that a majority of Americans—a decisive 78 to 17 percent of the sample—believed that "there is a secret organization engaged in organized crime in this country which is called the Mafia."

A number of governmental investigatory bodies have held similar views. In 1951 Senator Estes Kefauver's Senate Crime Committee concluded that "there is a nationwide crime syndicate known as the Mafia [whose] leaders are usually found in control of the most lucrative rackets in their cities."

President Lyndon Johnson's 1965 Task Force on Organized Crime similarly concluded, "There is a nationwide alliance of at least twenty-four tightly knit Mafia 'Families' which control organized crime in the United States," whose members "are Italians and Sicilians or of Italian or Sicilian descent." According to the Task Force, these "families," linked

together by agreements and obeying a nine-member commission, control most of the illegal gambling and loansharking operations in the United States, as well as narcotics importation.

The Task Force also found that the Mafia had infiltrated legitimate businesses and labor unions and had made liaisons that gave them power over officials at all levels of government.

AN INDIGENOUS SYSTEM

A small but growing number of law enforcement officials, journalists, and social scientists who have been studying organized crime interpret these same facts quite differently. They see organized crime as an integral part of the American social and economic system, involving (1) segments of the American public who demand goods and services that are defined as illegal, (2) organized groups of criminals who are willing to take the risks involved in supplying them, and (3) the corrupt public officials who protect such individuals for their own profit or gain.

The history of organized crime in America dates back to the days when the lawless bands of the James Brothers, the Youngers, and the Daltons terrorized the Western frontier. Then, in the late nineteenth century, the "robber barons"—the Eastern industrial giants—transformed that frontier into financial empires. It was not, however, until the twentieth century and the growth of the modern city that organized crime, as we know it today, developed.

The organized crime that now thrives in American cities is rooted in the social and economic history of urban life. Urban history documents how the growth of the American city resulted in complex but demonstrable relationships among minorities, politicians, and organized crime. It is this network of relationships that reveals organized crime in America to be a home-grown variety, indigenous to American soil, rather than a foreign transplant.

We have long known that organized crime and the corrupt political structures of many major American cities enjoy a relationship in which success in one is heavily dependent on the right connections in the other. In this crucial relationship, the criminal is permitted to produce and provide those illicit goods and services that our morals publicly condemn but that our mores privately demand—gambling, stolen but cheap goods, illegal alcohol, sex, and drugs.

In return, the criminal must pay tribute to the political establishment. Social history testifies to how gangsters and racketeers paid heavily into the coffers of political machines in exchange for immunity from prosecution.

GHETTO ESCAPE ROUTE

The persons most willing to take the risks involved in organized criminal activity are, and have traditionally been, those who feel blocked from legitimate access to wealth and respectability. More often than not, these persons have been members of minority groups who settle in the slums of our cities.

Ghetto dwellers and their children have found organized crime an open route to escaping poverty and powerlessness. The successful gangster, like the successful politician, has become a neighborhood model, in addition, proving it is possible to achieve rapid and dramatic success in spite of the police and a variety of oppressors.

At the turn of the century, the Irish were one such minority group. They were quick to band together to form street gangs with colorful names like "The Bowery Boys" and "O'Connell's Guards," and they soon came to dominate organized crime and big city politics. Once they achieved political power (due at least partly to connections and pay offs surrounding illicit activities), their access to legitimate opportunities increased. Eventually the Irish won respectability in construction, trucking, public utilities, and on the waterfront and no longer needed to become involved in organized crime.

The aftermath of World War I ushered in the era of Prohibition and speculation in the money markets and real estate—arenas for power and profit over which Jewish and eventually Italian gangs fought for control. From the 1930s on, Italians moved into positions of power in both organized crime and politics. More have since gained access to legitimate means of acquiring riches and respectability, but the cycle continues as blacks and Hispanics seek to rise like the phoenix, out of the ashes of inner-city ghettos.

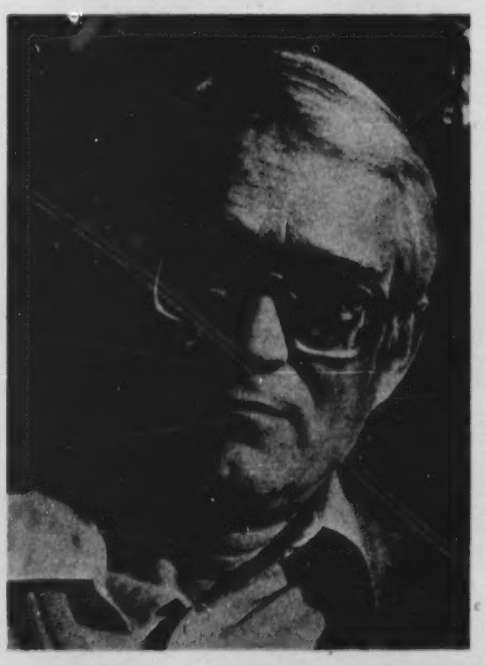
PERVASIVE CORRUPTION

Corruption in both government and private business also contributes to the livelihood of organized crime. There is considerable evidence of police indifference and even collusion in organized criminal activities. The police are usually the only visible representatives of the power structure at the street level where graft and corruption are most obvious. However, price gouging by merchants, profits from dilapidated housing for absentee landlords, kickbacks to contractors, bribes to inspectors, and the ever-increasing evidence of corruption in the judiciary, city hall, and the federal government are equally obvious to the people on the street of the inner city.

If organized crime is indeed an integral part of American economic, social, and political life, it becomes easier to understand why law enforcement agencies have met with little apparent success in their efforts to control organized crime. The principal and direct responsibility for its prevention rests with the *total* community—private as well as governmental sectors. Both sectors must make a concerted effort to provide viable alternatives to criminal behavior by offering better economic opportunities, decriminalizing some "vices," and eliminating corrupt practices in both the private and official sectors.

The task is monumental; it requires providing models for public trust and ethical concern at every level of public and private enterprise. If, however, we hope to curb organized criminal activity in America, we must begin to deal with the reality of the situation.

Certainly we should continue to seek out and prosecute the organized criminals. But this is not enough. Organized crime would not survive were it not for corruption in government and industry; nor would it thrive without public support.



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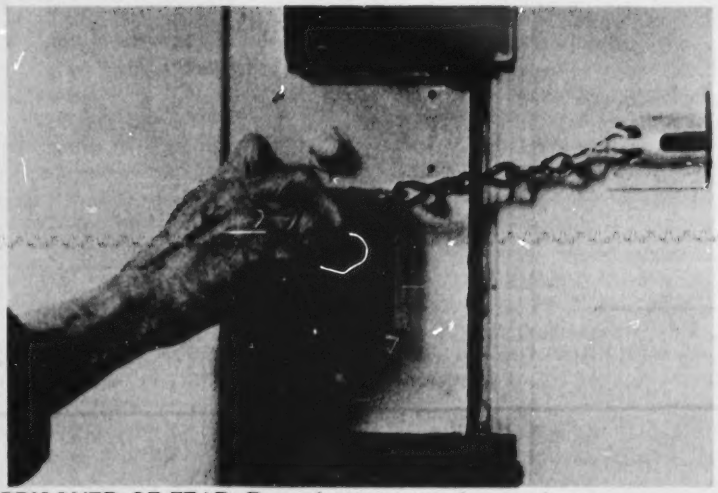

Yan Lukas/Rapho-Photo Researchers, Inc.

PRISONER OF FEAR. Fear of street crime has made many persons, particularly the elderly, prisoners in their own homes.

IV: THE URBAN CRIME PROBLEM

JAMES F. SHORT JR.

Crime has become a symbol of the city.

No other problem so embodies the fears and concerns of city people, or their apparent impotency to protect their persons and property, or to gain control over their lives.

City people—compared with others—are justified in their concerns over crime. "Street crime," "ordinary crime," by whatever name we call it, is predominantly an urban problem, though in recent years serious crime rates have been increasing more rapidly in suburban and rural areas than in large central cities.

Recorded crime has in fact increased substantially in city and country alike—by about one-third since 1970, for serious violent and property crimes, and by more than double since 1960, according to the Uniform Crime Reports of the FBI.

Public alarm over the seriousness of crime has grown in recent years along with rising official crime rates.

Yet, in fact, people may not be as powerless to affect the extent of crime as they think. An increased understanding of who commits most crime and why points to the very real possibility of achieving some measure of crime control through community action.

CRIMINAL STATISTICS

The statistics of crime must be viewed with caution. Sometimes the actual amount of crime is overstated, sometimes understated. Lincoln Steffens tells in his autobiography how he and rival reporter Jacob Riis "created" a crime wave in turn-of-the-century New York City merely by publishing stories of crimes ordinarily ignored by that city's press. Similarly, a Colorado study indicates that public opinion about crime reflects newspaper coverage of crime more closely than actual crime rates.

In addition, changing laws, for example, those regarding the manufacture, distribution, and use of drugs, change not only the statistics of crime, but the behavior of those who enforce the law, as well as those who violate it and are protected by it.

Increased alarm over crime has also led to increased reporting of criminal victimization. The precise amount of unreported crime is impossible to determine, but a decade of surveys suggest that the actual amount is two to three times that recorded in police statistics.

The conclusion that there is much more crime than is reflected in official statistics is supported by extensive studies in which citizens—usually young people—are asked to respond to questions about their own commission of crimes. These studies find that virtually everyone does things that are illegal, but relatively few go on to become serious criminals.

YOUTH AND CRIME

Among those who do commit serious crimes, young people from age fifteen into their early twenties are heavily overrepresented. The highest proportion of arrests for the violent crimes of homicide, forcible rape, robbery, and aggravated assault for the past several years has been of eighteen-year-olds; and for burglary, larceny-theft, and motor vehicle theft, of sixteen-year-olds.

Arrests of females for serious crimes have increased in recent years, but about 90 percent of those arrested for serious violent crimes and 80 percent for property crimes are male. Finally, arrest rates are highest for blacks and most other minority groups, and for the poor.

No one argues that being poor, young, male, black, or an urban resident makes one criminal. But these associations provide important clues to causation and to control.

So powerful are these associations between crime and age, sex, and urban poverty that they help to explain a large proportion of recent changes in crime rates. The population aged fourteen to twenty-four increased during the 1960s by more than 50 percent—the highest in our history, compared to only 10 percent during the 1950s and about the same projected for the 1970s. This placed great pressure on law enforcement, at a time when national and world events combined to produce explosive changes. Violence associated with an unpopular war and unfulfilled promises of the civil rights movement provided a legacy of crime into the 1970s.

POLITICAL VS. "ORDINARY" CRIME

While the vast majority of youth retain conventional aspirations and attachments to conventional institutions, some do not. The fragility of highly urbanized, technologically dependent societies is dramatically revealed by political kidnappings, airplane hijackings, threats to city water and power supplies, and seemingly random assaults justified by their perpetrators on political and ideological grounds.

The distinction between ordinary and politically motivated crime often is difficult to make, especially in countries such as Northern Ireland that are plagued by deep political, religious, and economic conflict. The rhetoric of ideology is widespread also in the United States, especially among some youth gangs and in prisons where those convicted of serious crime are overwhelmingly poor, young, minority status males. Many have little attachment to legitimate organizations and institutions, and therefore little stake in conformity.

Prison seldom strengthens conventional ties. Lessons learned and contacts made in prison provide greater opportunity and incentive both for revolutionary political activity and for a career in crime.

CAUSES AND CONTROL

Locking people up more efficiently and for longer periods of time may achieve a greater measure of safety—in the short run. In the long run, it is simply too expensive, and too divisive of society, to keep large numbers of citizens isolated for very long.

We must, therefore, deal with the causes of the crime problem in more fundamental ways, even as we protect ourselves from the most violent and destructive by incarceration.

The causes of crime range from parental and peer relationships to media messages; from individual characteristics to the structure of the society within which laws are written and enforced and inequalities of opportunity, wealth, and status are created and maintained.

The grinding effects of poverty in an affluent, consumer-oriented society, especially among youth who are a glut on the employment market and disvalued because of race or ethnic background, are reflected in the grim statistics of crime.

Recent studies suggest that the most important causes of ordinary delinquency and crime are related to the lack of effective controls emanating in families and other institutions and in communities. Families appear to be especially important in explaining the involvement of youngsters in minor delinquencies and so-called status offenses—behavior for which juveniles but not adults can be arrested. The community, however, is most important in explaining differences in serious criminal involvement.

Family relationships also play a larger role in delinquent behavior in stable and affluent communities, while serious involvement in crime is associated with peer relationships and other influences in economically poor, high-crime communities.

COMMUNITY CONTROL

The lessons of history and of recent experience with large-scale attacks on poverty and crime point to the crucial role of local community involvement in finding solutions to crime. Such community involvement has included efforts to increase reporting of criminal victimization, labeling of commonly stolen items to make positive identification easier and selling them more difficult, and citizen patrolling in cooperation with local police.

Other programs are designed to involve both young people and adults in adjudicating and disposing of less serious crimes by juveniles. Some communities are also experimenting with using volunteers in community correctional programs.

These measures have all helped to reduce some crime in some areas.

All programs are subject to abuse, however. The enthusiasm of discovering new crime control methods often is replaced by the rigidity of routine and of procedures that become unresponsive to ever-changing conditions.

The task, then, is to create community organizations that can remain flexible to meet changing needs and the commitment and continuing involvement of citizens in the affairs of their communities, especially as those affairs involve young people. For that is the crux of the crime problem.

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LOIS DeFLEUR NELSON is professor of sociology at Washington State University, where she joined the faculty in 1967. A distinguished visiting professor at the U.S. Air Force Academy in 1976/1977, she served as research director for projects on integrating women into the academy. She has published numerous articles about sex roles, drug abuse, and juvenile delinquency, and she is co-author of the best-selling textbook *Sociology: Human Society* and author of *Policing the Drug Scene*, soon to be released.

UPI Photo

INEZ GARCIA: RAPE VICTIM AND KILLER. Convicted for the second-degree murder of a man who raped her, Inez Garcia leaves Monterey County Jail in October 1974 to start serving a five-years-to-life sentence. Her conviction was overturned on March 4, 1977, after she had served fifteen months in prison.

V: SEX AND CRIME

LOIS DeFLEUR NELSON

For generations, crime has been associated with maleness in our society.

Reporting, recording, and writing about crime all reflected a basic value system in which the male role was dominant. Men were considered the primary perpetrators of most deviant activities. They were both the feared and revered participants in this sub-rosa world.

The few women discovered joining in criminal activities were regarded with distaste but were not treated too severely by the courts. But neither did they receive the full protection of the law—men were free to pursue many of their illicit pleasures, such as prostitution, with little fear of moral and legal recriminations, even though females were often the abused participants and victims.

This male dominance of the criminal world is now beginning to change.

As sociologist Freda Adler has noted recently, another generation of women will enter this criminal world, "a generation who, as girls, will think it perfectly natural to become carpenters or architects or steeplejacks or senators, a generation who will dream of running away from home to join the circus or growing up to become desperados or gunslingers."

The traditional view of the role of women in crime is thus responding to changes in the role of women in our society at large. But the emerging picture appears full of contradictions and conflicts.

CHANGING PATTERNS

According to arrest data, women's involvement in property crime, such as theft, embezzlement, and fraud, has increased dramatically in the last decade, with the arrest rate among females rising almost three times faster than that among males. Still, the rate of female arrests is only about one-third that of men. Female arrests for violent crimes, such as assault and homicide, have remained relatively low and stable.

Consistent with traditional sex roles, prostitution is a relatively frequent female crime. Male customers, in all but a few cities, are ignored as parties to a criminal act.

The statistics on rape indicate almost a fourfold increase in male arrests in the last fifteen years, but obtaining a conviction for this charge is still very difficult. Furthermore, although men are reported and arrested for rape, the primary accusations and stigma still fall on the female victims. For example, a Wisconsin judge recently declared rape a "normal" reaction of a teenage boy to women's revealing clothing and a sexually permissive society.

In the judicial system, data from courts indicate that in the past women have tended to receive preferential treatment in terms of charges, convictions, and sentences. In some states, for some types of offenses, females still are treated more leniently than males, but there are signs of increasing equity or even more severity in convictions and sentences for women.

Nevertheless, women are still less likely than men to be sent to prison. Furthermore, if they do go to one of the few female institutions, they will find that there are fewer training and rehabilitation opportunities than in men's institutions, although the actual living conditions also tend to be less severe.

How, then, do we make sense out of this changing situation? Several factors have to be considered, including traditional societal sex roles and their supporting stereotypes. These sex roles have had a strong impact on the ideologies and practices of those who attempt to control crime.

TRADITIONAL ROLES

The traditional activities for women in our society have revolved around the wife/mother and sex-object roles. In the past, female involvement in crime has been seen as an outgrowth of these roles.

A woman might have been a shoplifter, child abuser, or prostitute and was probably motivated by her relationships with men, emotional instabilities, or sexual maladjustments. It was assumed that such traditional roles provided both the framework as well as the restraining factors for female participation in criminal activities.

It is within this cultural background that citizens and criminal justice personnel responded to female criminals. Witnesses and victims of female crime were hesitant to take action against women since they felt women needed society's protection and probably were not particularly dangerous anyhow.

Similarly, police exercised more discretion when they encountered a woman in criminal activities, and they seldom either brought her in or charged her with an offense. Courts also tended to be lenient with the relatively few women who appeared before them.

However, this paternalistic and preferential treatment had its costs. Throughout the criminal justice system, "a fallen woman" often experienced discriminatory, severe treatment. For example, prostitutes were regularly rounded up and treated with disdain; rape victims were embarrassed and humiliated.

These same themes and stereotypes were embodied in the scant social science studies on women and crime until very recently. Many writers from a variety of disciplines offered social, economic, political, and psychological explanations of male involvement in criminal activities, but the few social scientists who focused on females emphasized primarily biological and/or psychological factors.

Women involved in crime were either maladjusted psychologically, inferior biologically, or had failed to adjust to the expectations surrounding traditional roles. These ideas prevailed until the 1970s.

THE WOMEN'S MOVEMENT

The contemporary women's movement that began in the late 1960s has had at least an indirect impact on crime and sex roles. The movement has resulted in increased awareness and sensitivity to changing sex roles on the part of the general public, criminal justice personnel, and women themselves.

There have been pressures for official agencies to alter their policies and practices and there is some evidence this is happening. For example, sociologist Rita Simon interviewed police, prosecutors, and others in the criminal justice system, discovering this recurrent theme: "If it's equality these women want, we'll see that they get it."

If, indeed, this attitude is reflected in official behavior, then we would expect that there would be some decline in preferential treatment for women in the criminal justice system. We could surmise, then, that some of the increase in reported female crime could be accounted for by these changes in official policies.

However, these same changes will mean that equal protection will increase, and that the often degrading and discriminatory treatment of women will decline.

We can speculate about other changes in sex roles and their impact on patterns of crime. For example, close to 50 percent of all women participate in the labor force, and increasing numbers are pursuing higher education. However, the majority of women still are employed in relatively low status clerical and service occupations and are not compensated for their labors commensurate with their training. Nevertheless, women are increasingly involved in activities similar to those of men.

NEW OPPORTUNITIES

Some social scientists believe that expanded roles for women will influence the motivations and opportunities for female involvement in crime. Females will acquire aspirations, expectations, and experiences beyond traditional roles—both legitimate and illegitimate.

Women will learn about the financial world, firearms, physical force, and other heretofore exclusively male realms. Their move into a wider variety of occupational and social roles will provide the necessary settings and opportunities for criminal activities, even the motivation and skills for violent crime. However, these changes are bound to be slow and will probably not result in dramatic increases in total female crime.

This means that when women are so inclined they will not have to depend on their relationships with men to enter, participate, or direct their criminal activity.

In the future, then, we can expect a gradual increase in female participation in a wider range of criminal activities. At the same time, as our value system changes, some predominately female crimes such as prostitution probably will be decriminalized.

Another long-term effect of changing sex roles will be the increased proportions of women entering occupations in the criminal justice system. Already cities are hiring more policewomen, more female lawyers are practicing criminal law, and women judges are becoming less of a curiosity. Indeed, these changes are becoming so accepted that they are reflected in television programs such as "Police Woman."

The overall effect should be increased equality and due process for both men and women in the criminal justice system.

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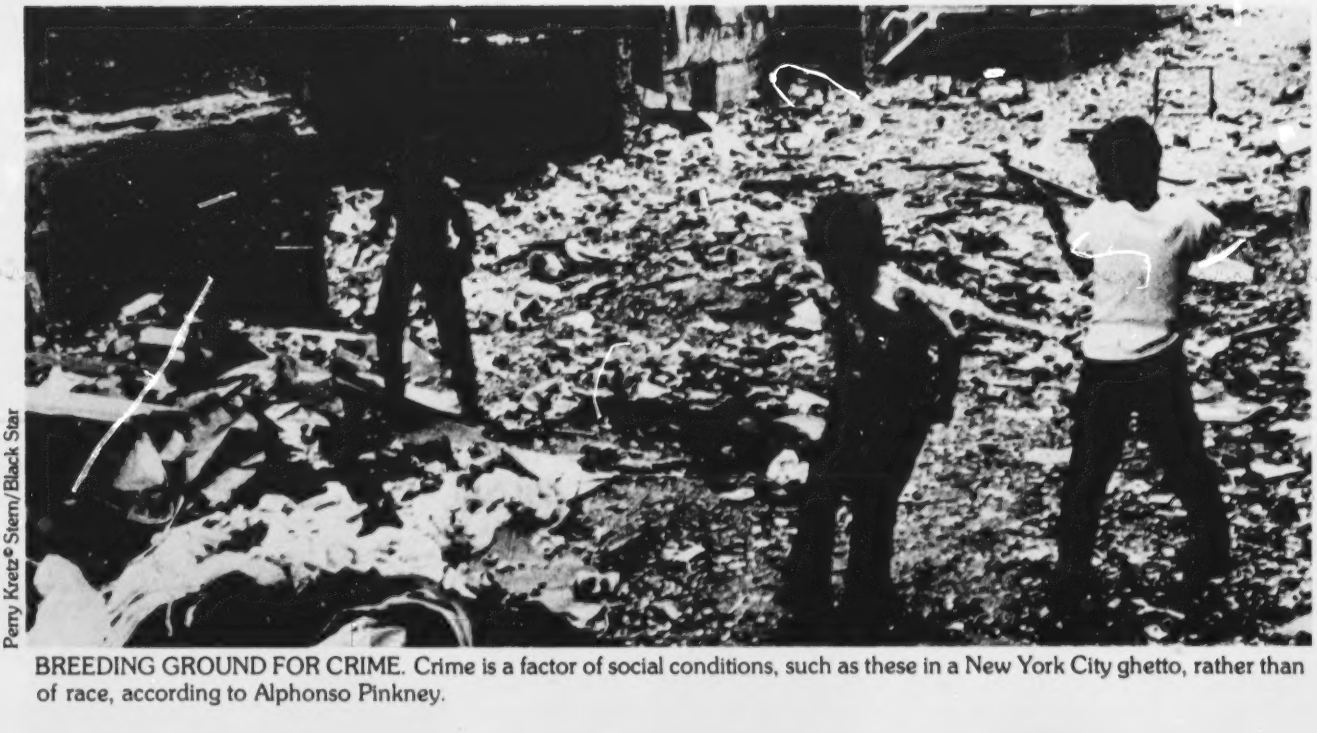

Perry Kretz© Stern/Black Star

BREEDING GROUND FOR CRIME. Crime is a factor of social conditions, such as these in a New York City ghetto, rather than of race, according to Alphonso Pinkney.

VI: RACE AND CRIME

ALPHONSO PINKNEY

We cannot expect an impartial system of criminal justice to exist in a society that practices various forms of oppression, one of the most blatant being the persecution of racial minorities. For social institutions and practices reflect the structure of the society within which they exist.

Nor can we expect that persecuted minorities would unhesitatingly support a system of law that has frequently been used to oppress them.

In the United States today, the laws aimed at regulating criminal behavior often interact with the racism of the society to maintain the oppression of racial minorities. Yet we expect members of minority groups to conform to those very laws and social practices designed to maintain their subjugation.

Real or imagined violation of these laws and customs brings forth police reactions, and people of color frequently find themselves entangled in a judicial system that many distrust because of its racism.

Such catch phrases as "crime in the streets," "law and order," and "war on crime" are most often used, however subtly, to refer to the behavior of racial minorities, especially black Americans, and to many of the policies designed to maintain their subordination. Both the public and those enforcing the law assume that blacks and other racial minorities are responsible for disproportionately high rates of criminal behavior.

CRIMINAL STATISTICS AND RACE

Yet such assumptions have long been challenged. As early as 1930, Thorsten Sellin, one of the nation's leading criminologists, questioned whether the real crime rate for blacks was higher than for whites. Although blacks appeared to be arrested, convicted, and committed to penal institutions more frequently than whites, Sellin maintained that social factors distorted the rates.

Most contemporary studies, based on more rigorous data, show that blacks are more likely to be arrested, indicted, convicted, and committed to institutions than whites who commit similar offenses. For example, the Federal Bureau of Prisons' records show that in 1972 the average prison sentence for members of racial minorities was fifty-nine months, compared to forty-five months for whites. More specifically, minorities convicted for income tax evasion received average sentences of thirty-one months, while whites convicted of the same offense received average sentences of fourteen months.

The FBI's Uniform Crime Reports indicate that in 1975 blacks and other racial minorities accounted for nearly one-fourth of all arrests while constituting only about 12 percent of the population. It should be emphasized that these arrests do not necessarily result in convictions.

With the exception of certain crimes against

"morals" and public order, the data show that black Americans are arrested somewhere between three and four times more frequently than whites. For Native Americans, the rate is three times that of blacks and ten times that of whites. Chinese and Japanese Americans have lower rates, with the latter group being the only racial minority with a lower arrest rate than whites.

These criminal statistics—no matter their validity—influence law enforcement policy and practice in such a way as to discriminate against persons of color. "High crime areas"—usually the inner city where most minority persons live—generally receive the heaviest police deployment. But the "speed trap" phenomenon applies to race as well as to traffic. If police are stationed in a given area, they will make more arrests, thus fulfilling the expectation that more crime will be committed in that area.

Age is another important factor in criminal statistics. Persons under twenty-five years of age accounted for nearly three-fifths of all criminal arrests in 1975, and the minority population is younger than the white. The median age of blacks, for example, is seven years younger than for whites.

Having noted the limitations of criminal statistics, it should be further emphasized that the arrest rates among racial minorities do not mean that these groups have inherently stronger criminal tendencies, for crime is a function of social factors, not race. The vast majority of members of racial minorities are law-abiding citizens.

OPPRESSION BY LAW

It would be nothing short of astounding if a group of people whose history in the United States includes centuries of slavery, calculated attempts at extermination, and other gross brutalities somehow managed to be more law abiding than their oppressors. For no group of people is content to be relegated to a life of oppression, and in America, the law has historically served to maintain the oppression of people of color.

It was the law that institutionalized chattel slavery; that deprived Native Americans not only of their land but also of countless thousands of their lives; and that caused thousands of citizens of Japanese ancestry to be incarcerated in concentration camps without due process. The litany of legally initiated or endorsed outrages against racial minorities is vast.

UNEMPLOYMENT AND CRIME

One of the major forms of racial oppression in the United States is economic discrimination, which is most readily manifest in unemployment statistics. Black Americans, for example, have for decades experienced an unemployment rate at least twice that of whites. The official unemployment rate for blacks in 1975 was 14 percent, compared with slightly more than 7 percent for whites. For black teenagers (sixteen to nineteen years of age), the situation is especially grim: at least 40 percent are unemployed, compared with only 18 percent of white teenagers. It is in this age category that arrests for criminal offenses are greatest.

While there are few conclusive studies showing a direct correlation between unemployment and crime, law enforcement officials and criminologists are making the connection, especially for crimes against property—burglary, larceny-theft, and motor vehicle theft.

On February 25, 1975, for example, a *Wall Street Journal* article based on interviews throughout the country concluded that "the consensus [among criminologists and law enforcement personnel] is that the link between crime and economics is far more than theory." Both the executive director of the International Association of Chiefs of Police and an official of the Federal Bureau of Prisons support such a conclusion.

Unemployment is but one form of oppression contributing to the arrest rates of people of color. Many other social factors must be taken into account. The mere fact of being racially visible increases the risk of becoming entangled in the criminal justice system. This stigma often leads to frustrations that are expressed in acts of aggression, often aimed at those of similar racial background.

DISCRIMINATORY JUSTICE

Furthermore, the oppression faced by members of racial minorities may prevent them from identifying with the society and the law. For example, nationwide surveys conducted for the National Advisory Commission on Civil Disorders found that two of the top ten grievances among black Americans were "police practices" and "discriminatory administration of justice." The criminal justice system itself, characterized by discretion at all levels from the arresting officer to the parole officer, is frequently manipulated to discriminate against them.

The high arrest rates among racial minorities also reflect the fact that legitimate means to achieve societal goals are often blocked by discrimination. Crime may therefore be seen by some as the only means available for achieving the symbols of success.

Furthermore, people of color are generally forced to live in areas of cities characterized by poverty, poor housing, and limited outlets for recreation. These conditions give rise to criminality and other forms of nonconforming behavior.

It is impossible to understand crime in America without a knowledge of the social conditions that often nurture and reward it.

For racial minorities, social institutions and practices operate to maintain their oppression, thereby leading some of them to commit acts that are considered to be criminal.

Since the connection between race and crime is caused by social factors, some of which have been enumerated, there is every reason to believe the conclusion of the President's Commission on Law Enforcement and Administration of Justice in 1967: "The Commission is of the view that if conditions of equal opportunity prevailed, the large differences now found between the Negro and white arrest rates would disappear."

ABOUT THE AUTHOR

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UPI Photo

RELEASE OF A "LIFER." Israel Karp, sixty-eight, is released from Clinton Correctional Facility, New York, after serving fifty-one years of his sentence on a second-degree murder conviction when he was seventeen. Philosophers disagree on whether such punishment can be justified because it is deserved or because it will deter others from crime.

VII: THE PHILOSOPHY OF CRIMINAL LAW

GERTRUDE EZORSKY

Criminal law is often seen as an instrument of social justice by persons who are not really aware of its limits or of the philosophical disputes concerning its proper purpose.

The criminal law is only a part of a broader system of legal justice. When a worker is injured on the job, the civil law may require that the employer compensate the worker. But when individuals commit *crimes*—for example, assault, arson, or murder—they are liable also to the penalty of imprisonment.

Imprisonment of the convicted lawbreaker symbolizes moral condemnation by society of the crime. Such punitive treatment is intended not merely to confine, but also to cast the criminal so confined into disgrace. Hence, offenders who do not deserve blame—for example, the insane or children—are usually not condemned as criminals, but excused from punishment.

Criminal law, say some philosophers, contributes to the moral conscience of humanity. The moral denunciation expressed by imprisonment presumably deepens our awareness that acts such as murder, arson, or kidnapping are morally reprehensible.

But, critics claim, criminal law induces an opposite effect. It encourages feelings of vengeance, and in places of imprisonment—outside of society—brutality is at home. Moreover, our law is not even-handed. An innocent defendant, falsely accused is, if unable to pay for skilled counsel, more likely to be convicted.

LEGISLATING MORALITY

Should all acts believed immoral by the community be prohibited, as crimes, by law? Remember that in the past, witchcraft was believed immoral by some communities, and punished—dreadfully—by law, as a crime.

Today criminal law lags behind changing moral

attitudes, especially in such matters as sex and drug taking. In many states, most forms of gambling are still a criminal offense.

Should the law—like a parent—coerce an individual, for his or her own good? Some state laws, for example, require a motorcyclist to wear a helmet. But the attorney general of New Mexico dissented from such *legal paternalism* by stating that a bareheaded cyclist may injure himself but not "his fellow man."

Or, as the nineteenty-century philosopher John Stuart Mill declared, law may coerce a person "to prevent harm to others." But, "over himself, the individual is sovereign." Mill would insist that "victimless crimes"—for example, gambling, homosexual acts, and drug taking—are private matters, that is, "not the law's business."

But is it true that cyclists who refuse helmets can only hurt themselves? If injured, they—like the motorists who disdain seatbelts—may cause suffering to their families or need hospital care at public expense.

Similarly, one's use of hair sprays may hurt others if such sprays contaminate the atmosphere. Should their use, therefore, be made a criminal act? There may be far fewer private matters in our society than are dreamt of in Mill's philosophy.

THE UTILITARIANS AND DETERRENCE

According to the utilitarian philosopher Jeremy Bentham, the criminal law, like all human institutions, should be fashioned to yield "the greatest happiness"—or the least unhappiness—for the community. The threat of punishment, utilitarians hope, would deter a rational person tempted to break the law. Hence that threat reduces the misery and insecurity wrought by crime.

A utilitarian, appraising the value of legal punishment, is like an individual contemplating a painful dental procedure. By submitting to pain now, the dental patient avoids greater pain in the future. The utilitarian views punishment in a similar fashion: By inflicting misery on criminals now, society prevents greater future misery to potential victims of crime.

Many persons measure the success—or failure—of legal punishment by its effectiveness in reducing crime. But it is hard to tell whether legal punishment is effective as a deterrent. *How often* does the threat of imprisonment stop the criminal (once punished), or the ordinary citizen (never punished), from breaking the law? Do you know *how many* crimes you would commit in a society without legal punishment?

Even if punishment accomplished the deterrent task assigned by utilitarians, critics claim that penalties devised by utilitarians might still not achieve justice.

Imagine, for example, that six months of preventive detention effectively deterred many eighteen-year-old high-school dropouts from future crime. Indeed, by comparison with other crime control methods, such preventive punishment minimized social costs most effectively. On a cost-benefit basis, the utilitarian would opt for preventive detention.

But most of these eighteen-year-olds never committed a crime. They do not *deserve* to be punished.

Thus the utilitarian philosopher is committed to undeserved punishment—surely an injustice. There is a considerable moral difference between an individual voluntarily deciding to endure pain at the dentist, and society—through coercion—deciding to punish innocent persons for future benefits.

Perhaps this preventive detention example seems far fetched. But it should be remembered that our society has engaged in massive preventive detention, for example, the internment during World War II of innocent Americans whose only "crime" was their Japanese ancestry. Surely they did not deserve to be punished, either.

RETRIBUTIVISTS AND JUSTICE

Retributivist philosophers, such as Immanuel Kant, Georg Hegel, and Francis Bradley, find the utilitarian perspective on punishment morally unacceptable. According to Kant's principle of humanity, a person should never be used merely as a means to an end.

Punishment, declares the retributivist, should therefore never be inflicted for the welfare of the community. Criminals should be punished because they deserve it, and for no other reason.

Some critics see retributive punishment as vengeance—an uncivilized response. But for a retributivist philosopher, punishment is administered not to take vengeance but to balance the scales of justice. Even the punished criminal, claims Kant, knows in his heart that justice has been done.

On some occasions, most of us think like retributivists. Recall the Nazi war criminals convicted at Nuremberg. Suppose that punishing them did not prevent similar crimes, or indeed, do any future good for society. Should they have been excused from punishment? Many would, in this case, join with the retributivist: Punish them because they deserve it.

But should ordinary offenders be punished just because they deserve it? Suppose, just for the sake of argument, it were proven that punishment did not really reduce the extent of crime. (Any temporary crime reduction accomplished by isolating offenders in prison was cancelled by the tendency of former criminals—unemployable because of their records—to commit more crimes.) In that case, I suggest that society has no moral obligation to pay for penal institutions.

Why support a prison instead of a hospital, unless prisons, like hospitals, are necessary to prevent human misery?

Or suppose an alternative to punishment, for example, vocational therapy, were proven less costly and more effective in preventing crime. Surely, opting for that alternative makes good moral sense.

Let us grant that retributivists were right when they faulted utilitarians for flouting Kant's principle of humanity. Criminal punishment, if morally acceptable, should surely be deserved.

But the utilitarians were not altogether wrong. Criminal punishment, if morally acceptable, should also show itself capable in the enterprise of minimizing human pain.

The Limits of Criminal Law: Non-victim Crimes

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UF' Photo

LEGAL OFF-TRACK BETTING. Bettors wait in line on opening day of off-track betting in New York City's Grand Central Station. Considered by many to be immoral, off-track betting was illegal in New York until April 1971.

VIII: THE LIMITS OF CRIMINAL LAW: NON-VICTIM CRIME

JOHN KAPLAN

The drug pusher lurks by school yards and tempts our youth.

The big time gambler bribes our police and corrupts our judges.

The gaudily dressed prostitute is an affront to our morality as well as a spreader of disease.

These images of so-called non-victim crime cause great apprehension in America.

Yet the economic and social costs of enforcing laws against these crimes are also great—perhaps too great compared to their benefits. In 1975, for example, 38 percent of all arrests were for non-victim crimes, putting an enormous strain on our criminal justice system.

Actually, "non-victim" is really a misnomer. The major non-victim crimes—drug offenses, gambling, and prostitution—often do have victims: the participants themselves, their families, and often the whole society.

It would be more accurate to call these crimes "consensual," to emphasize that those participating in them do so willingly.

The consensual crimes that trouble us most are those in which human weakness, economic incentives toward criminality, and often a basic ambivalence toward the activity among a sizeable number of people all interact. Since those involved rarely, if ever, complain to the police, attempts to suppress these activities have been notoriously ineffective and expensive, causing a substantial drain on the criminal justice system and increasing the social cost of the prohibited activities.

MORAL OVERTONES

The strong moral and emotional overtones of these laws perhaps account for the great reluctance of our legislatures to withdraw the sanctions of the criminal law in these areas. Yet there are reasons to be hopeful that decriminalization will occur.

Fifty years ago, the most important non-victim crime was the violation of Prohibition. While alcoholism and drunkeness are still with us, the corruption and strains on our criminal justice system caused by this crime disappeared after repeal.

Ten years ago, one of the leading non-victim crimes was abortion. Now, although abortion is still a subject of great political and moral concern, the diversion of resources to prosecute "abortion rings" has ended, and the number of pregnant women killed in abortions has dropped sharply.

DRUG OFFENSES

Drug offenses, primarily against the marijuana and heroin laws, may be regarded as the prototypes of non-victim crimes today.

The private nature of the sale and use of these drugs has led the police to resort to methods of detection and surveillance that intrude upon our privacy, including illegal search, eavesdropping, and entrapment.

Indeed, the successful prosecution of such cases often requires police infringement of the constitutional protections that safeguard the privacy of individuals.

The major charge against marijuana laws is that their enforcement accomplishes little, and at considerable cost. First, though no drug is completely safe, marijuana is simply not dangerous, at least compared with alcohol. Second, the lack of significant increase in marijuana use in those states that have "decriminalized" small-scale possession indicates that criminal penalties for such conduct were never very effective.

We simply do not catch a high enough percentage of users to make the law a real threat, although we do catch enough to seriously overburden our legal system. (In the United States, in 1975, there were over 400,000 marijuana arrests—most of which were for small-scale possession.)

Moreover, criminal prosecution for the use of marijuana inflicts a sizeable injury on many otherwise law-abiding youths and engenders hostility toward the police. In addition, since many users see no harm in marijuana, they have become skeptical of educational programs designed to lower use of "hard" drugs.

The laws prohibiting the sale of marijuana prevent both a users' tax on sales that could net government at least $500 million at present rates of consumption, and the exercise of controls similar to those of our alcohol licensing system.

DRUG PUSHERS

Most important, legitimizing and regulating the sale of marijuana would weaken the link between marijuana and the more dangerous drugs. Since drug sellers already are threatened with severe penalties if they are caught selling marijuana, they have little to lose, and more profit to gain, by converting their clientele to more dangerous drugs. Just as prohibition of alcohol did not suppress it but merely turned its marketing over to organized crime, so marijuana prohibition merely turns over the marketing of that drug to drug pushers.

The cost of the heroin laws are quite different from those against marijuana. The law, by prohibiting importation and sale, has raised the price of heroin far above what it would command in a legal market. But heroin, unlike marijuana, is seriously addicting, and hence the addict must come up with the necessary price of his habit. As a result, heroin addicts commit a very high percentage of crimes against property in our urban areas—an estimated 25 to 50 percent in New York.

Proposals to ameliorate the heroin laws have focused on providing the drug or a closely related substitute, methadone, to addicts at low prices under medical conditions—thus lessening their need for illegal income.

GAMBLING

Other costs of enforcing laws against the "non-victim" crimes are illustrated by gambling. Our effort to prevent people from losing more than they can afford has crowded our courts with gambling cases. The sentences are light—to avoid further overcrowding our jails—but the police are demoralized by the whole process. According to the National Commission on Gambling, the huge profits from gambling provide the major source of police corruption in the United States as well as the single largest source of income to organized crime.

Tne final cost of prohibiting gambling is that it prevents hard-pressed state and local governments from earning revenue through taxation or operation of gambling enterprises. It is probably this fact that is changing our legal stance toward gambling. Numerous states are already experimenting with lotteries, off-track betting, and other formerly illegal gambling activities.

A REVOLVING DOOR

The other major non-victim crime in our society is prostitution. In most localities there is little attempt to interfere with the higher class call girls, the "massage parlor" that has become a fixture all over the nation, or even, in some areas, the "houses" that can afford protection.

What little energy law enforcement can afford to devote to the matter is concentrated on streetwalkers. For them, prostitution is a revolving-door crime, somewhat like gambling, in which those arrested are typically given minimal sentences and are soon back on the streets.

There is a strong element of hypocrisy in the enforcement of the prostitution laws. First of all, the customers, even when legally guilty of an offense along with the prostitute, are virtually never prosecuted because of opposition by the commercial, hotel, and convention interests on the ground that it would be "bad for business."

Moreover, the police engage in substantial perjury to avoid the charge of entrapment and to obtain sufficient evidence for conviction "beyond a reasonable doubt." And perhaps even more upsetting, the police must often suppress their best evidence because they cannot admit having sex with the prostitute before the arrest.

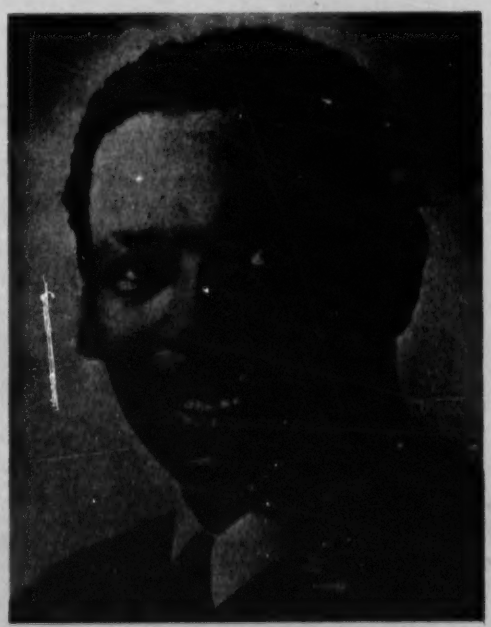
Finally, the laws against prostitution make more necessary the services of the pimp to arrange bail and police protection for the illegal prostitute.

Several other non-victim crimes, although less troublesome, also deserve note. The pornography laws, the laws against homosexual activities, and, in many states, the laws against adultery all establish non-victim crimes whose enforcement is spectacularly ineffectual.

In all of these crimes, a sizeable percentage of the public believes that the activity in question is immoral and wishes it stopped. In many cases, however, the next step—making the activity a criminal act—has been taken without thought as to the practical consequences of such laws should they be violated.

Only comparatively recently have we begun to think about weighing the costs of such laws against their benefits. It is important that we question whether the criminal law is more appropriate than either tolerating the activity or regulating it in some less coercive and expensive way.

Civil Liberties and Criminal Law



ABOUT THE AUTHOR

Damon J. Keith

DAMON J. KEITH has served as United States district judge for the eastern district of Michigan since his appointment in 1967 by the late President Johnson, and in 1975 he was named chief judge of the district court. Selected by *Ebony Magazine* as "One of the 100 Most Influential Black Americans" for 1971-1975, he has held numerous public offices, including chairmanship of the Michigan Civil Rights Commission. He is the recipient of the NAACP's highest honor, the Spingarn Medal. Among his most significant cases is the *White Panther Wiretap* decision (1971).

UPI Photo

ERNESTO MIRANDA. Miranda is shown in 1967 after the Supreme Court overturned his conviction for kidnap and rape on the grounds that police had obtained his confession without first informing him of his constitutional rights.

IX: CIVIL LIBERTIES AND CRIMINAL LAW

THE HONORABLE DAMON J. KEITH

"Justice," declared Supreme Court Justice Benjamin Cardozo in 1934, "though due to the accused, is due to the accuser also. . . . We are to keep the balance true."

Many people, frustrated by high crime rates, feel that the Supreme Court in recent years has tipped the balance against the police and too far in favor of the accused.

But due process for the accused is an essential safeguard; shortcuts to justice lead only to tyranny. The criminal law in America is therefore not only a sword with which society strikes those who prey upon it, but also a shield by which an accused defendant is protected from a vengeful public or overzealous police, prosecutors, or judges. The legal system that defines and punishes criminal acts also sets the limits within which the state may investigate and prosecute the criminal.

Thus, a fundamental premise of our criminal law is that a defendant is innocent until proven guilty. And the burden of proof is on the state to show that the defendant is guilty beyond a reasonable doubt, not on the defendant to prove his or her innocence.

DUE PROCESS GUARANTEES

The basic procedural or "due process" rights of an accused in a criminal trial are provided for in the Bill of Rights.

The Fourth Amendment prohibits unreasonable searches and seizures and directs that warrants shall issue only upon probable cause, while the Fifth Amendment provides for the use of a grand jury to indict persons accused of serious crimes, and prohibits double jeopardy and self-incrimination.

The right to a speedy, public trial by an impartial jury is provided for in the Sixth Amendment, which also guarantees the defendant's right to know the charges against him, to be confronted with the witnesses against him, to have defense witnesses summoned, and to have counsel. And the Eighth Amendment prohibits excessive bail or fines and cruel and unusual punishment.

The Supreme Court, which breathes life into the Constitution, over the years has expanded the scope of these provisions to the benefit of the accused.

Of key importance has been the Supreme Court's

extension of federal due process requirements to state courts, in which most criminal cases are tried. The Supreme Court has incorporated, by judicial decision, the relatively specific safeguards for the accused of the Bill of Rights into the due process clause of the Fourteenth Amendment, which was applicable to the states.

THE RIGHT TO COUNSEL

Of great significance has been the Supreme Court's extension to indigent defendants of the Sixth Amendment's guarantee that an accused shall have "the assistance of counsel for his defense." In *Powell* v. *Alabama* (1932), the Court held that the right of an indigent defendant to counsel in a capital case was required by due process of law and applicable to the states under the due process clause of the Fourteenth Amendment.

Thirty years later, in *Gideon* v. *Wainwright* (1963), the Court extended the right to counsel to all cases involving a serious crime.

EXCLUSIONARY RULE

More controversial has been the Court's attempt to modify the actions of law enforcement officers in their search, arrest, and interrogation of defendants by excluding illegally seized evidence from trial.

For example, in *Weeks* v. *United States* (1914), the Supreme Court held that the Fourth Amendment prohibition against unreasonable searches and seizures of persons and property requires a federal court to exclude evidence obtained by federal agents in violation of the amendment. In 1961, in *Mapp* v. *Ohio*, the Court extended this rule to the states.

Critics claim that this exclusionary rule penalizes society and rewards the defendant for the mistakes of the police.

Others argue, however, that the police are concerned primarily with the confiscation of contraband and the disruption of suspected criminal activity rather than with ultimate conviction. Therefore the police are not deterred from illegal searches and seizures even if the case is thrown out of court. But alternative attempts to deter illegal police conduct—such as civil actions for damages brought against the police by victims of illegal searches—have proven largely ineffective. Thus the dilemma remains.

The exclusionary rule has also been used to exclude as evidence confessions obtained by the police from suspects who had been denied an opportunity to consult with counsel. In 1964, in *Escobedo* v. *Illinois*, the Court ruled that a confession thus obtained was a violation of the Sixth and Fourteenth Amendments.

MIRANDA

Two years later, in the landmark decision of *Miranda* v. *Arizona*, the Court laid down specific guidelines for police interrogation of persons in their custody. *Miranda* required law enforcement officers to warn suspects that they had a right to remain silent, that anything they said could be used against them in a court of law, and that they had a right to counsel before and during the interrogation. Only if a suspect waived these rights could police obtain a valid confession.

The *Miranda* decision has been severely criticized, not so much for the constitutional principles it enunciated, as for its critical view of police interrogation methods at a time when many police forces were under community pressure for not doing enough to halt the rapid rise in crime.

Also, as Fred Graham, Supreme Court correspondent for CBS News, wrote, the decision smacked of "benevolent authoritarianism" by the judiciary—an attempt to reform society from the top down, by imposing on the police rigid procedural rules.

Miranda came to symbolize the tension in our system of law between the protection we guarantee the accused and the protection we provide society from crime. As violence and street crime increased throughout the 1960s, many people felt that the criminals were winning the war on crime, not just on the street, but in the police station and courtroom as well.

But constitutional adjudication is never static. In *Johnson* v. *New Jersey* (1966), the Supreme Court held that *Miranda* was not to be applied retroactively. In *Harris* v. *New York* (1971), the Court held that a defendant's statements to the police, made without being informed of his "*Miranda* rights" and therefore inadmissable in the prosecution's direct case, could nonetheless be used to impeach the defendant's trial testimony. And in *Michigan* v. *Taylor* (1974), the Court held that evidence obtained in pre-*Miranda* interrogation could still be used against a defendant in a trial beginning after the *Miranda* decision. Over time, the balance drawn between the rights of the accused and the interests of the accuser seems sometimes to tip in one direction, sometimes in the other.

THE WRONG QUESTION

But to ask if the scales of justice have been tipped too far in favor of the accused is, I think, to misstate the question. We should ask instead if the civil rights of the accused are mandated by the constitutional safeguards against potential abuses of power by the government. I think that they are.

Anger at "permissive" judges obscures the fact that the Bill of Rights was included in our Constitution to protect the citizens of the newly created republic against government abuses of power.

If the government's power to search our property, seize our person, compel our confession, set our bail, direct our trial, and determine our punishment is unchecked, then no one is really safe from the possibility of an unjust arrest and conviction. The requirements of the due process amendments check the government's discretion and afford various weapons to the accused for his or her own defense.

We extend these safeguards to defendants not because we sympathize with what they may have done, but because in upholding their rights, we protect our own. In guaranteeing the rights of others to be innocent until proven guilty, and in limiting the methods the state can use to prove them guilty, we affirm our faith in a nation under law and our confidence in a free society.

UPI Photos

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IN THE LINE OF DUTY. (Left) Mayor John Lindsay and New York City Police Commissioner Patrick V. Murphy place hats over their hearts in tribute to Patrolman Gregory Foster, gunned down on January 27, 1972. (Right) Patrolmen playing with a resident of New York's Lower East Side, August, 1973, in an attempt to promote the idea that policemen are guardians of the people as well as guardians of the law.

X: POLICE: LAW ENFORCEMENT IN A FREE SOCIETY

JEROME H. SKOLNICK

Police are often regarded as the thin blue line between anarchy and order—and there is some truth to that notion.

Whenever police services have been removed from a city—as when police strike—crime has risen, although not always by as much as expected. Still, it has risen enough to make most citizens uncomfortable.

There is no question that police perform an essential public service. Yet the first formal police department in the Anglo-American countries was not instituted until 1829, in London.

England had sorely needed a major police force for three quarters of a century. The industrial revolution had encouraged migration to the cities. Unemployment and economic hardships following the Napoleonic wars led to widespread riots and protests over the climbing price of food. And the rise in urban crime reduced safety in streets and homes. "Society," wrote one historian of the period, "was in violent transition."

Still, most Englishmen—from Tories through Radicals—expressed greater fear of police than of crime and riots. Parliamentary commissions considered and rejected the police idea in 1770, 1793, 1812, 1818, 1822 and 1828. At the time, the obvious model for England were the police on the European continent, who were often oppressive, corrupt and arbitrary. The problem was, as it always is for a society valuing political freedom, how to reconcile governmental power with individual freedom.

FREEDOM AND ORDER

Sir Robert Peel, the Home Secretary, addressed the dilemma in several ways: First he spent several years reforming the criminal law before introducing his Police Act in 1829. He realized that the new police would

not be successful if required to enforce inconsistent, irrational or exceedingly punitive laws.

Peel and his associates also distinguished the police from the army—feared and mistrusted by the populace for their role in repressing disturbances—in two respects: Scotland Yard would not accept applications from senior military men for ranking positions in the new police. Moreover, the "Bobbies," as they came to be known after Sir Robert, were not to carry firearms. Deadly weapons were for the external enemies encountered by the army. The police regulated citizens and required guns only for emergencies.

Still, the new police were trained to be and to look authoritative. Uniformed police were carefully instructed to be fair and imperturbable. Force, when used, was to be measured, limited and minimal.

Finally, and most importantly, Peel established the linked ideas of police accountability and public support. Just as police ranks were to be drawn from the class of working people to insure citizen support, police were to be accountable for their actions to parliament and the courts. These linked ideas—legal accountability and public support—were the tools to resolve the dilemma between freedom and order.

Although America was also a "free society" with laws and institutions modeled on England's, no American police department was so carefully planned and organized as Scotland Yard. The first full-time United States police force was formed in Boston in 1837, after roving bands of Protestant rioters destroyed nearly every Irish home on Broad Street.

AMERICA'S SPECIAL PROBLEMS

Unlike the English police prior to the 1960s, American police from the 1830s to the 1970s have been involved with often tragic ethnic and racial conflict. This has generated special problems for American policing. For example, New York City experienced a riot in 1900 that grew out of competition between Irish and blacks for jobs and living space. The police did not stop the white rioters who were beating the blacks, they joined them.

In a country with a history of immigration, rapid territorial and economic expansion, and slavery, the quality of law enforcement has often depended upon the question "whose law, whose order?"

Nor has the police function ever been clear in the United States, either to the police themselves or to the general public. Most police like to think of themselves as crime fighters. Studies have shown, however, that about 80 percent of a police officer's time is spent providing a wide variety of community services and peacekeeping functions such as giving directions, handling traffic accidents and resolving family disputes. Less than 20 percent of an average patrolman's time is spent on crime-related activities.

Police enforce the criminal law by arresting violators and providing prosecutors with evidence, so as to lead to a conviction—no easy assignment. But police are not usually able to catch criminals in the act. That is why the recent "sting" tactics, where police pretended to "fence" stolen goods but actually photographed the seller and tagged his wares, have been so successful. These records show exactly who did what crime, where and when.

Ordinarily, police must rely on street informants—themselves involved in crime—for information about crime. In return, police can offer the informant immunity from arrest or some other "break" in the administration of justice.

This practice creates serious problems about the equity and efficiency of police procedures. I once conducted a study of vice detectives and burglary detectives in a respected urban police department. The vice detectives used burglars as informers and did not inquire about their burglaries, while burglary detectives used addicts as informers and ignored their drug offenses.

POLICE DISCRETION

Since police departments have limited resources, police must employ considerable discretion in carrying out responsibilities. Police chiefs set priorities, employing personal values and departmental standards to govern conduct. Every student of police agrees that this police "culture" heavily influences how police conduct themselves on the job.

Often, police employ discretion sensibly and responsibly. At other times, discretion can deteriorate into police malpractice. Malpractice refers to a broader spectrum of behavior than police corruption. Corruption normally suggests the sale of official authority for personal gain, whereas malpractice includes not only corruption but also mistreatment of prisoners, discrimination, illegal searches, perjury, planting evidence, and other misconduct committed under the authority of law enforcement.

Police culture—especially unwritten codes of conduct and solidarity—is of critical importance here. New York City's Knapp Commission found in 1972 that, contrary to popular thinking, New York police corruption, no worse than in many other city police departments, was not attributable solely to "rotten apples." Where malpractice exists, it usually spans entire police departments.

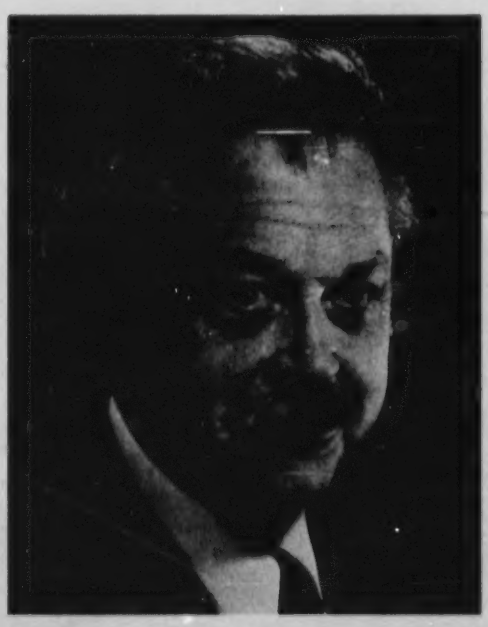
Policemen everywhere experience feelings of isolation, public rejection and hostility in a job characterized by danger, authority and the pressure to produce. Consequently, policemen build up intense feelings of group loyalty, coupled with deep suspicion of outside interference. In most American police departments there is a stubborn refusal at all levels to acknowledge that malpractice problems exist, especially corruption.

In the long run, the police themselves, the community and victims of crime will best be served by police accountability for the quality of their policies and work. Television programs to the contrary notwithstanding, the U.S. constitution does not envision police as asphalt cowboys, riding herd on crime and disorder in the central cities.

Police are government officials, armed by law, whose monopoly on force is a public trust in a free and democratic society. They fail when they are transformed into distant and mobile authorities, encased in vehicles, remote from the communities they serve.

Sir Robert Peel understood that when he created the first western democratic police organization. His ideas about how to reconcile policing and freedom—in periods of rising crime and social turbulence—scarcely seem dated.

Pre-Trial Detention: Bail or Jail



ABOUT THE AUTHOR

Caleb Foote

CALEB FOOTE has been professor of law and criminology in the Law School at the University of California, Berkeley, since 1965. He previously taught at the University of Pennsylvania and he has been admitted to the practice of law in Pennsylvania and before the United States Supreme Court. Author of *Studies on Bail* and co-author of *The Culture of the University* and *Cases and Materials on Family Law*, he was also chiefly responsible for drafting the report of the American Friends Service Committee, *Struggle for Justice: A Report on Crime and Punishment in America.*

Tom Lesley, Black Star

"ENTOMBED." Inmates in the Manhattan House of Detention for Men, known as "The Tombs," await court hearings and trials. The Tombs was closed by Federal court order in December, 1974 as unfit for inmates.

XI: PRE-TRIAL DETENTION: BAIL OR JAIL

CALEB FOOTE

To an accused person spending many weeks or even months in jail awaiting trial, the doctrine that an accused is innocent until proven guilty seems a mockery. The accused is, in effect, being punished before conviction.

But if released from custody, the accused may escape justice by running away, compromise the trial process by intimidating witnesses or commit a crime before being brought to trial.

The failure to guarantee to all citizens, regardless of race or economic circumstances, due process and equal protection under the law constitutes one of the most pervasive denials of equal rights in the entire judicial system.

What to do with the accused until trial has plagued every system of criminal justice at least since Plato wrote about the problem more than 2000 years ago. The traditional Anglo-American response to this dilemma is the bail system, which uses financial incentives to deter flight.

The accused can be conditionally released upon the deposit of financial security to back up his promise to show up in court or trial; if he fails to appear, the security is forfeited. The amount required to be posted is set by a judge at the accused's first appearance in court following his arrest and is supposed to be determined after consideration of such factors as the seriousness of the crime charged, the accused's prior record and the strength of his ties to the community.

FREEDOM BEFORE CONVICTION

In all except death penalty cases, this right to bail pending trial is guaranteed by federal law and almost all state constitutions. "This traditional right to freedom before conviction," the Supreme Court said in 1951, "permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."

It is important to recognize, however, that the "traditional right" is merely that of having a judge set the amount of bail which is required in a particular case to secure pretrial freedom. While the amount, according

to the Constitution, cannot be "excessive," courts have held that the amount "usually fixed" for the offense charged meets this requirement. If the defendant cannot afford that amount, he stays in jail.

Ordinarily, the amount of bail ranges from $1,000 to $25,000, although in some cases bail has been set as high as one million dollars. As most defendants do not have such assets, a bonding system has developed whereby a defendant can purchase the required security from a licensed bondsman for a premium—usually around ten percent of the required bond.

Thus, if bail is set at $5,000, a defendant can pay a bail bondsman $500, which is not refundable, and the bondsman will post the $5,000 bond in the defendant's behalf. As the bondsman is liable to lose the $5,000 if the defendant disappears, he frequently protects himself by demanding some collateral, and many people do not have sufficient collateral.

In any event, a bondsman is not required to put up bond for anyone and will only do so if he regards the defendant as a good risk. The result is that many defendants find themselves unable to obtain a bond.

EQUAL JUSTICE?

This system may have worked tolerably well when there was little concern for the rights of slaves or paupers, and when such protections of the Bill of Rights as the right to counsel or bail depended upon the ability of the defendant to pay for them. The perpetuation of such economic discrimination is incongruous, however, in a society that has abolished slavery and proclaims "equal justice under law" as its ideal.

Such discrimination has been recognized and at least ameliorated in connection with other civil rights; thus the state must supply counsel and the means for appeal to a defendant even if he cannot pay for them. But a right to pretrial liberty remains a dead letter as far as most poor persons are concerned.

Furthermore, intensive studies my students and I conducted during the 1950s show that persons detained because of inability to post bail receive more severe sentences if found guilty. Likewise in many cases, as the Supreme Court has implicitly recognized, it is hard to defend oneself against conviction when behind bars.

Moreover, American jails used to detain persons accused of crime are overcrowded, unsanitary and unsafe. Ironically, a detained defendant who is found guilty and sentenced to imprisonment will usually be transferred to an institution where living conditions are far better than those in jail—where one is entitled to the presumption of innocence.

The criminal system, from the Supreme Court down to public defenders, has taken no effective action to remedy these manifest infringements of due process, equal protection, and unconstitutional punishment.

OWN RECOGNIZANCE

A short-lived concern with the impact of poverty upon the fairness of the criminal justice system during the sixties resulted in the development of pretrial release procedures which eliminate or minimize financial security.

The most common is "release on own recognizance," or "OR." According to procedures employed in Federal courts and in many cities, a superficial social history of the accused is compiled soon after arrest. If the defendant is deemed to be a good risk, the judge is authorized—but not required—to grant OR release instead of demanding bail.

This reform has had only slight impact on the discrimination problem. It has not improved conditions in jails, and probably most of the limited number of defendants who have been released on OR could have afforded bail.

Perhaps the net impact of OR has been to intensify the discriminatory effect of poverty, for poor people now come into court under a double handicap: not only do they suffer the prejudice that results from poverty in the disposition of their cases, but they are now often considered "unreliable" as well. Consciously or unconsciously, judges, juries and counsel may reason that if they had been worth anything they would have been released on OR.

PROTECTING SOCIETY

Several reasons account for this failure of OR and related reforms to resolve discrimination against the poor in pretrial detention. Most important is the judicial response to public demands for protection against crimes committed by defendants on pretrial release. Although in theory the law is clear that risk of flight is the only relevant criterion for bail setting, judges usually demand high bail whenever they perceive the slightest risk of crime to the public.

To date, we have not developed any scientific techniques for predicting future criminality that do not involve gross errors of overprediction. But despite its illegality and its simplistically erroneous assumptions, preventive detention is not only tolerated but often demanded. For example, in New York City in 1976 a black judge who followed the law in generously granting OR releases was severely criticized; the pressure exerted by newspapers, police and prosecutors resulted in his transfer to a civil court.

Thus the great majority who are not dangerous are detained because they cannot be distinguished from the minority who are. The media aggravates this misuse of detention by systematically publicizing escapes or crimes by OR defendants, while ignoring both those on OR who do not commit crimes, and the systematic discrimination against those who, although "safe," have been denied OR and are unnecessarily locked up.

Below the surface is another pervasive force operating to prevent effective reform. The administration of criminal justice in America is like a bargain basement, viable only if eighty to ninety per cent of all defendants plead guilty. Plea bargaining is the heart of the system and, rightly or wrongly, it is believed that if most or all poor defendants were released pending trial instead of being jailed, the rate of guilty pleas would drop, the courts would then be unable to handle the increased volume of trials, and chaos would be the result.

This probably explains, if it does not justify, the otherwise incredible failure of the Supreme Court, courts in general and lawyers to do anything about what has become the most pervasive denial of equal justice in the entire criminal justice system.

Plea Bargaining and Sentencing

ABOUT THE AUTHOR

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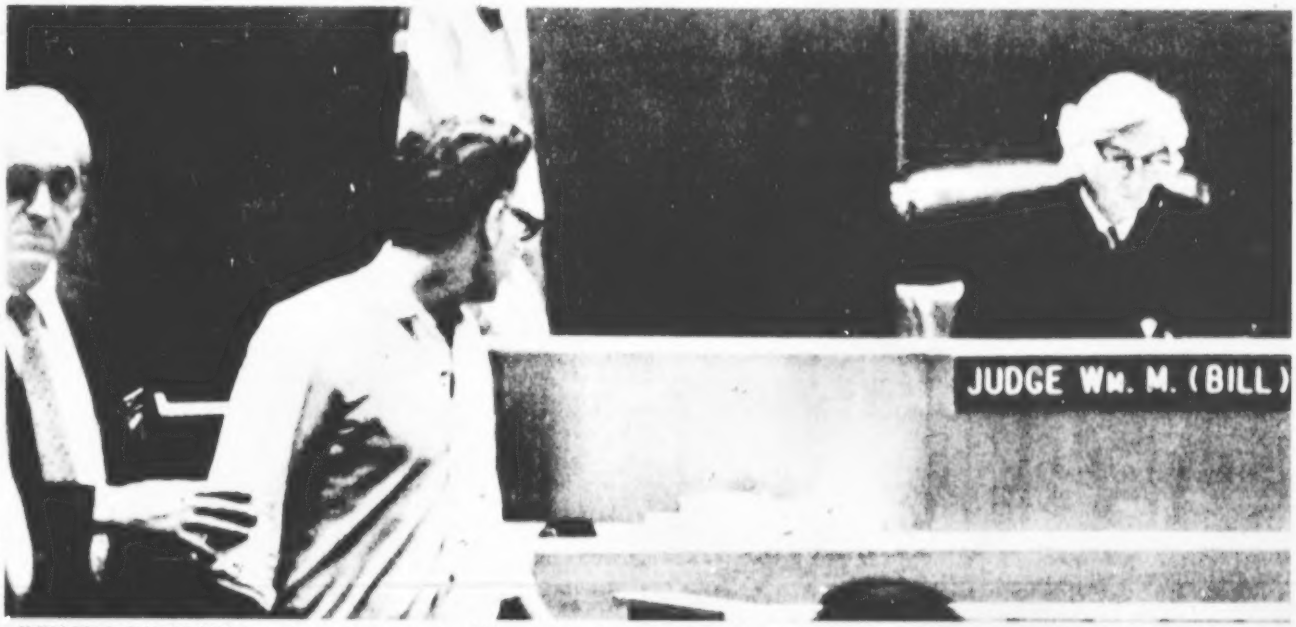
ALAN M. DERSHOWITZ is professor of law at Harvard University, where he began teaching in 1964 after serving as law clerk to Mr. Justice Arthur Goldberg of the United States Supreme Court. He has argued many major cases before federal courts, including more than half a dozen before the U.S. Supreme Court. His books include *Fair and Certain Punishment*, the Report of the Twentieth Century Fund Task Force on Criminal Sentencing, and *Criminal Law: Theory and Process* and *Psychoanalysis, Psychiatry and the Law*, both of which he coauthored.



UPI Photo

JUDICIAL DISCRETION. State district judge William M. Hatten of Houston hears an extradition case involving former mental patient Gary Addison Taylor (in white), wanted in Seattle, Washington, for the murder of a young woman. The discretionary power of judges like Hatten to determine the fate of the accused is often virtually unlimited.

XII: PLEA BARGAINING AND SENTENCING

ALAN M. DERSHOWITZ

"The imposition of sentence is probably the most critical point in our system of administering criminal justice," observed Marvin Frankel, a distinguished jurist, in 1973.

It may, literally, mean the difference between life and death, freedom or confinement, short- or long-term imprisonment.

The power of the sentencing judge, in many jurisdictions, is awesome. Without giving—or even having—reasons, a judge may decide to sentence one robber to probation and another, different in no relevant respect, to twenty years in prison. Nor can these sentences generally be reviewed by a higher court.

Despite the enormous power of the sentencing judge, the process of imposing sentence is essentially lawless. There are few guidelines and virtually no accountability.

Both observers of, and participants in, the American criminal justice system are almost unanimous in viewing the process of imposing sentences as a dismal failure by any standard.

Yet the imposition of sentence is *crucial* because, for many defendants, it may be the only point in the criminal justice system—other than bail determination—where a judicial decision is made. Despite popular fascination with the drama of the courtroom trial, the vast majority of criminal cases are disposed of without any trial. The defendant agrees to plead guilty to a given crime, in exchange for some concession by the prosecutor—a reduced charge or a promise to recommend a reduced sentence.

In some jurisdictions, judges participate overtly in this bargaining. In most jurisdictions, however, judges remain aloof from the negotiation. They retain the power—at least in theory—to accept or reject the prosecutor's recommendation and to impose any sentence within the statutory range.

GLARING DISPARITIES

The unfairness and uncertainty of this sentencing system has been amply documented.

In one recent study, fifty federal judges were given twenty identical files, drawn from actual cases, and asked to indicate the sentence they would impose on each defendant. In a case of possession of barbiturates with intent to distribute, one judge gave the defendant five years in prison, while another put him on probation. One judge sentenced a defendant con-

victed of securities fraud to two years imprisonment, while another fined him $2,500.

This study, commissioned by a group of judges, concluded that there were "glaring disparities" in sentencing. Similarly, a recent study of sentences imposed during a two-year period in Montgomery County, Ohio, disclosed that certain judges imprison defendants four times as often as other judges for the same offense.

Disparities of this kind cannot be explained by differences among criminals. They are—as one judge recently observed—a function "of the wide spectrum of character, bias, neurosis and daily vagary encountered among occupants of the trial bench."

There is also evidence that some of the disparity is a function of prejudice: social, economic, and cultural. An exhaustive study of state and federal sentences for larceny and assault disclosed that blacks have a one-and-a-half times greater chance of being imprisoned than whites with similar records. Other studies have shown that defendants appearing in low-status dress are significantly more likely to receive prison sentences than comparable defendants wearing higher status clothing.

Two centuries ago, Blackstone, the great English legal commentator, observed that the sentences handed down by judges are not "their" sentences, but the sentences of the "law." Today, it is the judge—as an individual—who decides who shall be imprisoned; and it is the judge and the members of the parole board, not the "law" as an abstraction, who decide how long an imprisoned defendant shall serve.

CRITICS OF THE SYSTEM

Recently, there has been mounting criticism—from the left and right alike—of a sentencing system that makes so much depend on the idiosyncrasies of individual sentencing judges.

Liberal critics believe the sentencing system discriminates against poor and minority criminals and in favor of white-collar and privileged criminals. Conservative critics argue that current sentencing practices result in the early release of dangerous, violent people.

The specific focus of much of this criticism has been the so-called indeterminate sentence—a mechanism by which the amount of time a convicted criminal will actually serve is decided by the "parole board" or "adult authority" while the prisoner is serving his sentence. Both the legislature and the sentencing judge still play important roles; the legislature sets the outer limits of the permissible punishment for the type of crime, while the judge decides on the desirable range for the crime and criminal. But these limits are often broad, and the parole agency thus becomes responsible for deciding what really counts: when the defendant will be released.

The indeterminate sentence is merely one manifestation of the existing disparity in sentencing. The underlying cause is the unchannelled *discretion* exercised by *all* the sentencing decision makers—judges, prosecutors, parole boards, and adult authorities.

REFORM MEASURES

In an effort to impose some uniformity of sentencing, a number of legislatures—including Congress—are now considering significant reforms. Some of these reforms, however, address only a small part of the problem.

For example, mandatory minimum sentencing for certain offenses deals only with discretion at the low end of the sentencing spectrum. It *requires* judges to impose a certain minimum sentence (perhaps a year) upon everyone convicted of a specific offense (for example, illegal possession of a handgun, as in Massachusetts).

Flat-time sentencing retains *judicial* discretion by allowing the judge to select the "appropriate" sentence from a wide range of alternatives; but it eliminates *parole board* discretion by requiring the inmate to serve his entire term (minus "good time").

The approach that seems to be attracting the most attention is a compromise solution called "presumptive sentencing." Under that approach, or its many variants, the legislature decides not only on the minimum and maximum sentences for a given crime, as it does today, but also on the "presumptive" sentence for a "typical" first offender convicted of a "typical" instance of this crime.

The legislature might thus decide that the typical burglar—an unmarried, unemployed, uneducated male in his early twenties who broke into an inhabited house late at night without a weapon and took several hundred dollars worth of valuables—should generally serve one year. One year would thus become the presumptive sentence for this crime.

In the absence of legislatively specified aggravating or mitigating circumstances, the sentencing judge would be expected to impose that sentence on all first offenders convicted of that crime. If the judge departed from the presumptive sentence, he would have to detail in writing the reasons for his decision. All sentences departing from the presumptive one by more than a specified percentage—for example, 25 percent—would be automatically appealable. The sentence would be reversed unless the appellate court concluded that the judge's reasons had overcome the presumption in favor of uniformity.

Under this approach, the parole board would retain only limited power under unusual circumstances to release the inmate before the expiration of a statutorily fixed percentage of his sentence (for example, 75 percent).

In the end, neither this nor any other proposed solution to the dilemma of sentencing will be a panacea. The elusive quest for the fitting punishment has occupied the collective wisdom of mankind since the beginning of recorded history.

The pendulum appears now to have swung in the direction of greater certainty and uniformity in sentencing. Undoubtedly some reform will be forthcoming, and we will see not the demise of individualization in sentencing, but its waning influence. Perhaps a decade from now a reaction will again set in and the pendulum will swing back in the direction of increased flexibility.

Punishment: A Historical Perspective

ABOUT THE AUTHOR

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PRISONS, USA—SING SING: Inmates of nineteenth and early twentieth century prisons were often forced to march in lock step and observe strict rules of silence.

XIII: PUNISHMENT: A HISTORICAL PERSPECTIVE

DAVID J. ROTHMAN

The sight of the monumental walls and huge towers of an American state prison conveys such an impression of fixity and permanence that one easily forgets that incarceration is a comparatively modern practice.

Penitentiaries do have a history. They have not always been with us. A sensitivity to this history, an understanding of the causes for their creation and perpetuation, can help to clarify for us what we can and cannot expect of these institutions.

Our colonial forefathers relied upon very different methods of punishment. Convinced that the threat of deviant behavior came mostly from outsiders, they guarded town boundaries with all the diligence we reserve for an international frontier. To preserve their insularity, towns regularly banished or expelled suspicious characters and petty offenders. When neighbors committed minor offenses, the courts had recourse to fines or to the whip, or, more commonly, to shaming the offender by displaying him in the stocks. The local jails served only the purpose of detaining those charged with a crime until time of trial.

The colonists, as tough-minded Calvinists, did not anticipate the reformation of the criminal or the eradication of crime. And they understood, too, how limited their powers were: if a whipping did not deter the offender, there was little they could do, little that is, except have recourse to the gallows. The result was an unbalanced system, vacillating between harsh and mild punishments.

Such procedures could not survive the growth of cities, or the rise in the number of immigrants, and the frequency of migrations westward in the early nineteenth century. With the insularity of the community destroyed, and with Enlightenment and republican

ideology making capital punishment seem a barbaric remnant of a cruder age, some kind of new sanctions would have to be created.

REFORM AND REHABILITATION

That the alternative became the penitentiary reflects the very special outlook of its founders, the Jacksonian reformers of the 1820s and 1830s. These innovators shared grandiose ambitions. They would not merely deter but eliminate crime; they would not punish but reform the criminal. The Jacksonians were the first to announce the theme that would persist to our own day: prisons should be places of rehabilitation.

These reformers were at once optimistic about the perfectability of man and pessimistic about the ability of a democratic society to cohere. Criminal behavior, they reasoned, reflected the faulty organization of society. Judging their own cities by exaggerated notions of the stability of colonial towns, they saw the easy morals of the theaters and saloons replacing the authority of the family and the church.

To counter what they took to be this rampant disorder, they invented the penitentiary. It was to be a model, almost utopian community that would both inspire the society and, at the same time, instill habits of obedience and regularity in its inmates.

From these notions the penitentiary took its first form. To isolate the inmate from all contaminating influences, prisons were not only located at a distance from the cities, with visits and mail discouraged, but prisoners, living one to a cell, were under strict rules of silence. A bell-ringing punctuality prevailed. At the sound of a gong, inmates marched in lock step to work, then to eat, and then returned to their isolation.

As acute an observer as Alexis de Tocqueville concluded: "The regularity of a uniform life . . . produces a deep impression on his mind." If the inmate was not released an honest man, at the least "he has contracted honest habits."

FAILURE OF THE SYSTEM

It did not take long, however, for the good order of the prisons to degenerate. By the 1850s, even more clearly by the 1880s, the institutions became overcrowded, brutal, and corrupting places. State investigations uncovered countless examples of inhumane treatment—prisoners hung by their thumbs or stretched out on the rack. Clearly, incarceration was not reforming the deviant, let alone eradicating crime.

And yet, the system persisted. Part of the reason may reflect the seeming practicality of confinement; at least for a time the incapacitation of the offender protected society. Further, the prisons were filled with immigrants (first the Irish, later Eastern Europeans, still later the blacks). The confinement of a group that was both "alien" and "deviant" seemed appropriate, no matter how unsatisfactory prison conditions were.

NEW REFORMS

But such functional considerations were not as central to the continuing legitimacy of incarceration as the persistence of reformers' hopes that prisons could rehabilitate the offender. Each successive generation of well-intentioned citizens set out to upgrade the penitentiary. The problem was not with the idea of incarceration but with its implementation.

Thus, the Progressives in the period 1900-1920 tried to "normalize" the prison environment. They abolished the rules of silence, the lock step, and the striped uniform, and looked instead to freedom of the yard, prison orchestras, schools, and vocational education to rehabilitate the deviant.

In the 1920s and 1930s, psychologists urged the adoption of more sophisticated systems of classification so that prisoners could be counseled on an individual basis. New modes of therapy would readjust the deviant to his environment.

Both groups of reformers welcomed the indeterminate sentence and parole. Rather than have a judge pass a fixed sentence at time of trial, the offender should enter a prison as a patient would enter a hospital. When he was cured, not before and not later, he would be released.

Again and again, the translation of these programs into practice was disappointing. No matter how keen the effort, prisons could not become normal communities. Classification schemes were not well implemented; parole became a guessing game, anything but scientific or fair in its decisions.

Nevertheless, each time a prison riot occurred or another example of brutality was uncovered, reformers insisted that the fault lay with the poor administration of the system, not with the system itself. Eager to do good, determined to rehabilitate the deviant, they continued to try to transform the prison into a place of reformation.

NEW GOALS

Beginning in the mid-1960s, a new generation of reformers began to question the very idea of incarceration. For the first time, well-intentioned observers began to wonder whether the basic concept of the prison was faulty. These reformers were frank about their inability to understand the roots of deviancy or to rehabilitate the deviant.

Armed with so few answers and suspicious of inherited truths, they contended that punishment should aim, not to do good, but to reduce harm; that a system of sanctions should abandon grandiose goals and try to avoid mischief. Perhaps fixed sentences of short duration to the avowed goal of punishing the criminal would create a more just and no less effective system.

Clearly this agenda is not a very exciting banner under which to march. Prior generations of reformers, after all, had promised to eliminate crime. And today's less idealistic outlook is peculiarly liable to misunderstanding; if we cannot reform the criminal, why not lock him up and throw away the key?

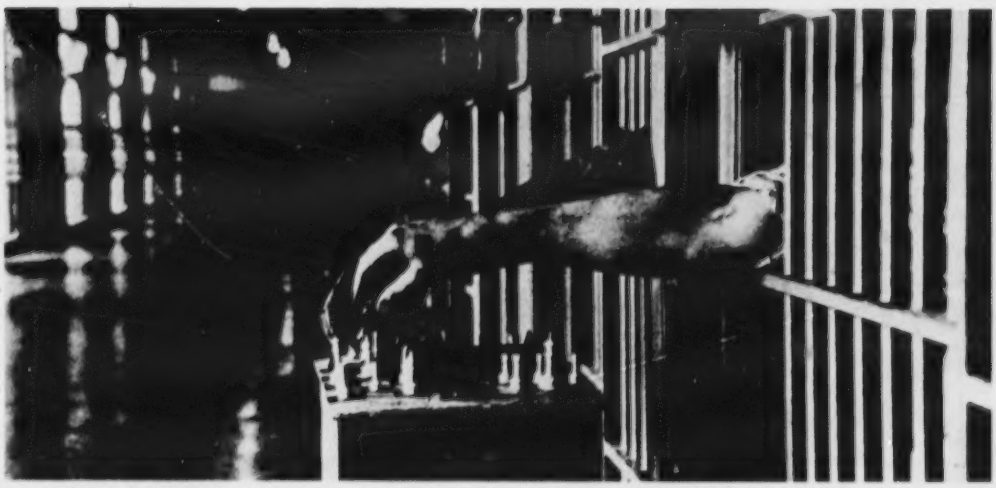
An historical analysis does not provide us with many clues as to how this latest reform effort will turn out. Indeed, an historical analysis does not offer answers to how punishment should be meted out in our society. What it does offer, however, is a dynamic as opposed to a static perspective on incarceration. Penitentiaries were the response of one generation to its specific problems, and later generations experimented with their own solutions. If we now find inherited practices unsatisfactory, we are now obliged to devise our own answers.

The Prison Community

ABOUT THE AUTHOR

John Irwin

JOHN IRWIN, an ex-felon, is an associate professor of sociology at San Francisco State University. The originator of Rebound, a college program for ex-prisoners, he has also served as project director for several studies of rehabilitation and education programs in prisons. He is the author of *The Felon* and *Prisons in Turmoil*, the latter scheduled for publication in 1977.



Cornell Capa for McKay Commission/Courtesy UPI

PASSING THE TIME. Inmates at Attica Correctional Facility, New York, play chess with unseen opponents. The movement for prisoners' rights at institutions like Attica produced a temporary solidarity among inmates, but their grievances sometimes spilled over into bloody riots.

XIV: THE PRISON COMMUNITY

JOHN IRWIN

Most of our ideas about male prisons are mistaken because they fix on a type of prison—the "big house"—that has virtually disappeared during the last twenty-five years.

In the "big house" the prisoners—mostly white—lived according to the "convict code." Primarily, this meant not informing on other prisoners, "doing your own time," and not talking to guards.

Prisoner leaders—"right guys"—taught and enforced the code. A few prisoners carried on illegal activities like making "pruno"—a nasty tasting prison brew—and got involved in prison sex, a peculiar sexual world with "jockers"—the masculine partners, "punks"—prison-made homosexuals, and "queens"—self-admitted homosexuals.

But most prisoners stayed close to a few prison friends, worked at their job assignments, took up hobbies, played sports, read, and tried to stay out of trouble.

Administrators ran the "big house" with one overriding concern: to keep the place running smoothly and out of the public's attention. Guards kept the peace by striking a bargain with the convicts: "Don't get too far out of line and I won't bother you, but if you cause me any trouble I'll bust you."

By and large the big house was a mean and monotonous place, but peaceful. Contrary to popular belief, most prisoners didn't learn crime there, but they didn't learn how to live outside either. They learned how to do time and about half came back to serve more.

THE NEW VIOLENCE

Today's prisons, in contrast, are torn by violence, with inmates assaulting both each other and their guards. Gang warfare is common, and by 1973 the murder rate inside San Quentin was twenty times higher than that in the outside world.

Meanwhile, penologists, prisoners, and the public have all come to recognize that prisons are failing to rehabilitate convicted criminals or deter others from crime.

What has caused such turmoil? And what can be done to end the war behind walls and ensure that prisons serve their purpose?

The decline of the big house began after World War II, when many states seriously tried to "rehabilitate" prisoners. Innovative penologists accepted the idea that criminals were sick and could be cured, and they developed elaborate classification systems to diagnose criminals' sicknesses; therapy, education, and vocational training programs to cure them; and indeterminate sentence systems to release prisoners when, but not before, they were cured.

In the early years of rehabilitation many, perhaps most, prisoners accepted the idea that they were sick and willingly participated in the new programs. Communication flowed more freely between prison-

ers and staff, and the gap between them narrowed. Many prisoners stopped thinking of themselves as "criminals" or "convicts," and the ties of the convict code that had held prisoners together weakened.

By the 1960s, however, social scientists and prisoners began questioning the worth of rehabilitation. The new programs had not really helped ex-prisoners faced with the same conditions that, in the past, had pointed them toward crime.

Furthermore, under the dogma of rehabilitation, prisoners were subjected to indeterminate sentence systems. Parole boards fixed and refixed sentences for reasons that were never quite clear to the prisoners. On the average, prisoners served more time. In California, for example, the median sentence increased from twenty-four months in 1950—the real beginning of the rehabilitative era—to thirty-eight months in 1968.

Harshly punitive measures, such as indefinite segregation in "adjustment centers," were slipped in as "rehabilitative" devices. The discrepancy between rhetoric and reality produced a sense of rage and injustice among prisoners.

RACE WAR

At the same time, racial hostilities soared. Prisons in the East, North, and West that formerly housed predominantly white prisoners now contained half or more nonwhite prisoners.

Black prisoners began organizing religious, cultural, and political groups. Chicanos in the West and Puerto Ricans in the East followed the lead of black prisoners. Violence between races increased drastically, and many prisons became tense battlefields with voluntary segregation by race.

In the late 1960s outside political activists became interested in the prisons and began working to improve them and to help prisoners organize. For a short period a political "movement" grew among prisoners of all races. Prisoners planned strikes, formed unions, and even ran a prison in Walpole, Massachusetts for eleven weeks after the guards walked out in protest over the administration's lenient policies.

Although the old "big house" order based on a single convict code and respected prison leaders had been torn apart, involvement in political organizations and demands for prisoners' rights temporarily created a new form of solidarity among inmates and reduced racial violence.

Prison administrations across the country acted swiftly to stop this new development. They identified prison leaders as "revolutionaries" and segregated, transferred, or paroled them. They succeeded in halting or stalling the prison political movement.

However, without a unifying purpose, the prisoners have again split into hostile factions. These divisions, particularly racial divisions, prevent prisoners from following a single code.

Many inmates have formed gangs or cliques to protect themselves and to control drugs and other contraband, including money, which is now in the prisons in large amounts. Gang members attack rivals and retaliate when attacked.

CONTEMPORARY PROBLEMS

Most prisoners, as always, try to avoid trouble, but this is now more difficult. They must obey the informal rules of racial segregation enforced by the gangs and tiptoe carefully around violent gang members. Even then they run some risk of being assaulted, robbed, raped, or murdered.

Prisoners now assault guards much more frequently. Accordingly, guards have grown more hostile towards prisoners *and* towards the administrators, whom they blame for the dismal state of the contemporary prison. Prison guards are organizing into labor unions that demand more punitive policies against prisoners, in addition to such traditional labor benefits as higher pay.

Unfortunately, we are stuck with our contemporary prisons. Despite talk about "alternatives to incarceration," the public will accept no substitutes that are more humane.

Some convicted persons may be placed on probation or in halfway houses. Others may be sentenced to volunteer services or some alternative to prison. But the public will ordinarily demand that those convicted of serious crimes be imprisoned. Actually, the expansion of "community corrections" has increased the number of people in the control of the criminal justice system by adding new categories of minor offenders, as the number of offenders in prison also rises.

LIMITATIONS

Since we are stuck with prisons we must understand their limitations. Presumably prisons deter many free citizens from committing crimes, yet, our selection process for prison actually reduces their deterrent value. Less than 10 percent of the persons charged with a felony are sent to prison, and by and large these are the poorer and less deterrable criminals, not necessarily the most serious. Consequently many citizens accurately conclude that they will not be sent to prison even if they commit crimes and are caught.

Prisons punish people. But *heaping* punishment upon the few sent to prison embitters and damages them. They perceive that they are carrying the entire punishment burden, and they break or rebel under the strain.

We could increase deterrence and reduce the turmoil in prison if we were honest about what we are doing—punishing prisoners—and delivered shorter sentences to all persons convicted of serious crimes.

I believe that prisoners should be allowed to form organizations that would unify their warring factions. These organizations would have to have some real responsibility in running the prison so prisoners would actually participate in them. They should also have access to outside grievance mechanisms so that many of the practices that unnecessarily degrade, injure, and embitter prisoners would be discouraged. It is likely that these measures would reduce the turmoil greatly.

However, such changes would *not* make prisons into "country clubs." Prisons are inherently unpleasant and are intended to be.

The Future of Punishment

ABOUT THE AUTHOR

Sheldon L. Messinger

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Leo M. Dehnel/U.S. Bureau of Prisons

PRISON TRAINING FOR A TRADE. The structural trades training program under the joint sponsorship of the U.S. Bureau of Prisons, the Texas Rehabilitation Agency, and the AFL-CIO prepares inmates at the Fort Worth, Texas, Federal Correctional Institution for admission into the union's apprenticeship program. In recent years, many critics have questioned the value of rehabilitation efforts.

XV: THE FUTURE OF PUNISHMENT

SHELDON L. MESSINGER

America houses a vast and complicated sanctioning enterprise, ranging from bastille-like prisons through one-cell lockups, to nonresidential "treatment facilities" and "treatment programs" sometimes reaching out to whole families. And current trends seem likely to make it larger by bringing a greater proportion of America's citizens under the supervision of criminal justice officials.

HOW MANY ARE PUNISHED?

Fully accurate figures are not available. Piecing together various surveys and informed guesses, we can estimate that on any given recent day some 60,000 juveniles were being held in jails, detention centers, shelters, training schools, reception and diagnostic centers, county and local ranches, camps, farms, halfway houses, and group homes. An additional 500,000 were under probation supervision outside these facilities; and 100,000 were on parole from them.

Comparable figures for adults suggest 285,000 in state and federal prisons; 150,000 in county and local jails; 670,000 on probation; and 150,000 on parole.

These figures—almost surely undercounts for 1977 in most instances—add up to 1,915,000 locked up or under some form of official supervision every day; about 1 out of 110 Americans. And the figures do not include the apparently increasing number of family members encouraged or required to accept "treatment" when one of them is in trouble with the law.

It should be kept in mind, too, that these numbers represent only those locked up or under supervision on any given day. The number in these circumstances at some time during any year is much, much larger.

Thus, over half a million juveniles were admitted to and released from custodial institutions in any recent year; while over a million adults had this experience. Perhaps as many as one American in every fifty or sixty is locked up yearly, while many more are supervised or "treated."

Although the sanctioning enterprise is large and complex, nobody is pleased with how it operates. Discontent with inherited punishment practices has led to two seemingly contradictory trends that together should heavily influence the future of American punishment.

DIVERSION

First, since the early 1960s, there has been a major effort to "divert" law violators from the system in the hope that "alternatives" to conventional forms of punishment would be more effective at reducing crime rates and recidivism, more humane, and less costly. "Diversion" encompasses a variety of procedures old and new, still poorly conceptualized or understood.

But broadly speaking "diversion" involves, on the one hand, halting justice system action against someone believed to have violated a law in favor of dealing with the person in some other way—referring a juvenile to school authorities, for example, or an adult to a job-training program. On the other hand, it involves imposing a noncustodial penalty—like intensive probation supervision—on a convicted offender who might legally have been committed to jail or prison.

"Diverting" suspected and convicted offenders to "community-based treatment programs" is widely understood as a move *away* from punishment, particularly imprisonment.

JUST DESERTS

Second, more recently there has been strong support for the view that the proper business of the juvenile and criminal justice systems is punishment, not treatment. According to this view, law violators should be given their "just deserts" in proportion to their offenses and past records.

A loss of faith in the efficacy of "treatment" is a negative source of this view, but it is coupled with the positive hope that more severe punishment—longer prison sentences or imprisoning more offenders—might help stem rising crime rates. Many also support this view for moral reasons, seeking a more principled basis for apportioning sanctions than "treatment" has turned out to be.

This support of the "just deserts" position is interpreted as a move *toward* punishment, with imprisonment to play an increased role.

A CONTRADICTION?

These seemingly contradictory trends of diversion and the "just deserts" approach may, however, be complementary—in effect, if not intention. Their joint outcome is likely to be punishment, including imprisonment, for a greater proportion of suspected and convicted law violators in the future.

Consider this: Although the effort to "divert" law violators from custodial institutions has been in force for some time, their populations are not being reduced; instead, they are increasing. A recent survey found a 12-percent increase during 1976, and there was a similar gain during 1975.

Indeed, there has been an increase in prison populations each year since 1969, except for 1973. And fragmentary data suggest that 1977 will also show increases. Jail populations also appear to be rising. This is true for juveniles as well as adults.

COMMUNITY PROGRAMS

Confinement, however, is by no means the only available sanction.

Since the turn of the twentieth century, an increasing proportion of juvenile and adult law violators have been placed under some form of supervision in the community via probation or parole. The burgeoning development of "community-based treatment programs" is an extension of this long-term trend, and presently some two-thirds of adjudicated offenders are under such supervision.

Such "programs" are considered as an "alternative" to imprisonment, but they are also "alternatives" to doing nothing at all or almost nothing—like reprimanding a suspected offender or discharging a convicted one. There is growing suspicion, based on still-scanty evidence, that this latter "alternative" is the prevalent one.

Thus, while custodial institutions continue to hold the same or an increasing proportion of the population, a rapidly escalating proportion of minor offenders or suspects is being placed under supervision, often with intermittent periods of custody to reinforce "treatment" plans. But one rub is that, so far as can be told, "treatment" in the community is no more effective at curbing renewed delinquency and crime than any other "program."

The move toward "just deserts" seems likely to encourage the imprisonment of a greater proportion of offenders, to the dismay of some of its proponents but to the satisfaction of others, who support it for just this reason. Judges, reluctant in the past to imprison law violators for the indeterminate periods that might be necessary for "treatment," are likely to be more willing to imprison offenders for "determinate" periods that are fixed according to the offense.

At the same time, reducing judicial and parole board discretion to determine the length of prison terms should result in more desirable uniformity.

Given the cost of imprisonment, the rise in inmate populations may also mean somewhat shorter terms for most prisoners. The more draconian prison terms—and the death penalty—will continue to be selectively applied, but the basis of selection is likely to focus more on acts, less on character and prospects.

CONFLICTING AIMS

In any event, the future of punishment will certainly remain a "problem" for which there is no "solution" in the ordinary sense of that term.

At best there are more and less satisfactory ways of reducing the tensions produced by our various and often conflicting punishment objectives: to reduce crime by deterring potential offenders or repeaters; to express disapproval of law-violating activities; to be just and fair; and to keep costs at a tolerable level.

Different groups in society define and value these objectives differently; and these definitions and values shift over time. We can therefore be confident of only one outcome—that tomorrow's practices will prove as troublesome as yesterday's or today's.